114 U.S. 355 - 411

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 169.

THE STEAMSHIP "BELGENLAND," HER TACKLE, APPAREL, &c., SAMUEL JACKSON, MASTER, AND THE SOCIETE ANONYME DE NAVIGATION BELGE AMERICAINE, CLAIMANTS, APPELLANTS,

vs.

THEODORE JENSEN, MASTER OF THE NORWEGIAN BARK "LUNA."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED NOVEMBER 28, 1881.

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1 In the Circuit Court of the United States in and for the ... District of Pennsylvania, in the Third Circuit.

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lows:

First. That the said barque Luna, ... as master,

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1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. No. 2. April Session, 1881.

THEODOR JENSEN, Master of the Barque "Luna," Libellant and Appellee,

vs.

THE STEAMSHIP "BELGENLAND," whereof Samuel Jackson is Master, Respondent and Appellant.

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1881, No. 2.

It is thus contained:

Be it remembered that on the third day of March, A. D. 1881, the proctors for the respective parties came into our said court here and filed the record of the district court of the United States for the eastern district of Pennsylvania, which, being read, is as follows, to wit:

2 In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

THEODOR JENSEN, Master of the Barque "Luna,"
vs.
THE STEAMSHIP "BELGENLAND," whereof Samuel Jackson is Master.
No. 78 of 1879. Collision.

Pleas before the honorable the judge of the district court of the United States for the eastern district of Pennsylvania.

It is thus contained:

Be it remembered that on the 16th day of September, A. D. 1879, Henry Flanders, Esq., one of the proctors of said court, comes into the said court and exhibits the libel and complaint of Theodor Jensen, master of the barque "Luna," against the steamship "Belgenland," whereof Samuel Jackson is master, in a cause of collision, civil and maritime, which, being read and filed, is in the words and figures following, to wit:

3 To the Honorable William Butler, judge of the district court of the United States in and for the eastern district of Pennsylvania:

The libel of Theodore Jensen, late master of the Norwegian barque Luna, on behalf of the owners of said barque, and on behalf of the owners of the cargo laden on board thereof, and also on behalf of the surviving members of the crew of said barque, against the steamship Belgenland, her engines, boilers, machinery, tackel, apparel, and furniture, and all persons lawfully intervening for their interest in the same, in a cause of collision, civil and maritime, alleges as follows:

First. That the said barque Luna, whereof the libellant was master,

of the burthen of three hundred and fifty-nine tons, register tonnage, being tight, strong, substantial, and well found, and navigated by her said master, and a crew of nine hands, sailed from Porto Rico on the fourth day of August, A. D. 1879, laden with a cargo of sugar, bound to Queenstown, Plymouth, or Falmouth for orders.

Second. Between one and two o'clock of the morning of the third day of September, the said barque, in the prosecution of her voyage as aforesaid, was in latitude about 49° 33′, and longitude 21° 43′. There was at the time aforesaid a drizzling rain, with a fresh breeze from between southwest and west southwest. The course of said barque was southeast by east one-half east, and her rate of speed between seven and eight knots per hour. While the said barque was in the position and situation thus described, the mast-head light of a steamer was discerned on board said barque, and reported by the lookout. The said steamer, which proved to be the Belgenland, the vessel proceeded against in this cause, was at this time, to
4 wit, when first discerned and reported, a mile or more distant, and the respective courses of the two vessels were such that they were meeting end on, or nearly so; that as risk of collision was involved in said courses, it was the duty of the said steamer Belgenland to keep out of the way of the said barque; that the latter vessel, in order not to embarrass her movements, and to enable her to do so, held her course; that said steamship, regardless of her duty, took no measures whatever to avoid the impending risk of collision, but came on at full speed, and struck the said barque so violent a blow at the after part of the forerigging, on the port side, that she was cut entirely through, and sank, with everything on board her; five only of the crew being saved, the others being lost.

Third. That the said collision, and the losses and damages consequent thereon, are imputable solely to the master and crew of the said steamship Belgenland, in consequence of their not having kept clear of the said barque, as they were bound to have done, by taking the necessary measures in point of time and space; and that the same were not in any sort or degree imputable to the said barque Luna, or any person on board her, who all did the utmost in their power to avoid or prevent the said collision; that by reason of said collision, the said barque, her cargo and freight, and the personal effects of the owners, master, and crew, were totally lost; that said loss will amount altogether to about $60,000.

Fourth. That the said steamship is now lying in the port of Philadelphia; and that all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this honorable court.

Whereupon the libellant prays that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steamer Belgenland, her engines, boilers, machinery, tackle, apparel, and furniture, and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid; and that this honorable court would be pleased to decree the payment of the damages as aforesaid; and that the steamer may be con-

demned and sold to pay the same; and that the libellants may have such other and further relief, as in law and justice they may be entitled to receive.

THEODOR JENSEN.

Sworn and subscribed before me, this 10 day of September, A. D. 1879.

CHARLES S. LINCOLN,
Clerk District Court U. States.

HENRY FLANDERS, *Proctor.*

5 And thereupon claim is made in the words and figures following, to wit:

In the District Court of the United States in and for the Eastern District of Pennsylvania. In Admiralty.

THEODORE JENSEN, Master of the Norwegian Bark Luna, *vs.* THE STEAMSHIP "BELGENLAND." } Plea Civil and Maritime for——.

And now, Samuel Jackson, intervening for the interest of the Société Anonyme de Navigation Belge-Américaine, appears before the honorable court and makes claim to the said steamship, her tackle, apparel, and furniture, as the same are attached by the marshal, under process of this court, at the instance of Theodore Jensen, master of the Norwegian bark "Luna;" and the said Samuel Jackson avers that he was in possession of the said steamship at the time of the attachment thereof, and that the persons above named are the true and *bona-fide* owners of the said steamship and that no other person is the owner thereof; and the said Samuel Jackson is master of the said steamship, and the true and lawful bailee thereof for the said owner; wherefore, he prays to be admitted to defend accordingly.

SAMUEL JACKSON.

Sworn and subscribed in open court, this 19th day of September, A. D. 1879.

(Signed) CHARLES S. LINCOLN,
Clerk District Court U. S.

6 And afterwards, to wit, on the 13th day of October, A. D. 1879, comes into the said court Martin P. Henry, proctor as aforesaid, and exhibits the answer of Samuel Jackson, master of the steamship Belgenland, to the libel and complaint aforesaid, and also his exceptions to the jurisdiction of the said court, and the same being filed are in the words and figures following, to wit:

In the District Court of the United States in and for the Eastern District of Pennsylvania. In Admiralty.

THEODORE JENSEN, Master of the Norwegian Barque Luna,
vs.
THE STEAMSHIP "BELGENLAND."
} No. ——, of 1879.

The answer of Samuel Jackson, master of the steamship Belgenland, intervening in his own behalf and on behalf of the *Société Anonyme de Navigatione Belge-América-ne*, owners of the said steamship, to the libel of Theodor Jensen, master of the Norwegian bark Luna, in a cause of collision, civil and maritime, respectfully showeth:

First. That it is true that a collision occured in the Atlantic Ocean in or about the latitude and longitude mentioned in the said libel between the steamship Belgenland and a barque which he has no doubt is the one mentioned in the said libel.

Respondent has no knowledge of the facts stated by libellants as to the course and speed of the said barque at or about the time of the discovery of the light of the said steamship by those on board the
7 said barque. But the respondent, on information and belief, denies that at the time of the collision, the course of the said barque was as stated therein; but on the contrary avers that at the moment of the collision the barque was steering nearly on a south course across the bows of the said steamship, showing that the barque had altered her course previously to the collision from that stated in the libel.

Second. That the breeze and character of the night was as therein stated, except that there was some mist with passing showers of rains.

The steamship was a large and powerful one, having a large number of passengers on board; carrying the Belgian and United States mails, and was well found and manned in all particulars, there being two officers, one boatswain, two quartermasters, and ten seamen in each watch. The said steamship carried a bright masthead light on the foremast, calculated to be seen at a distance of at least five miles. The side lights of the steamship were properly placed in boxes at the ends of the bridge aft of the foremast, the widest part of the ship, were of the regulation pattern for ocean steamships, and were well trimmed and lighted, and furnished with the best of oil used for the purpose, and were burning brightly at the time of the collision and also previously thereto, during the whole night, being carefully watched.

Third. That a careful lookout was kept that night; the second officer, who had the watch from 12 m. to 4 a. m., stationing himself on the weather or port side of the bridge, and another lookout man being stationed on the lee or starboard side—both protected by canvass screens, so that the spray should not distract their attention from the duties of observation. The fourth officer also was on the bridge at the time of and for about fifteen minutes prior to the collision, and one minute or two before the collision had gone over to

the lookout man on the lee-side of the bridge, cautioning him to be attentive to his duties, and himself had carefully looked out on that side of the bridge just before the collision.

8 That no light of any other vessel was seen by the lookouts of the steamship, when suddenly the officer of the deck, from his station, saw the jib and stay sail of a vessel across the jib-stay of the steamship, and close to and right ahead, and at the same time, the lookout man on the starboard side of the bridge saw the main-sail, and the rigging of the mizzen-mast of a vessel, from his position on the starboard side of the stay sail, close on and right ahead.

That although an order to hard a port, and stop were instantly given, there was no time to affect the course or speed of the steamship, which struck the barque between the foremast and main-mast, cutting her in two, the foremast and jib-boom passing along the port side; and the main-mast and mizzen-mast passing along the starboard side of the steamship; showing that the barque was steering almost at right angles across the course of the steamship and not in the direction which she was steering when the steamship was first sighted from her. The steamship was then steering northwest by west half west or directly in the opposite direction of that stated in the libel to have been the course of the barque.

Respondent avers that the barque must have changed her course previously to the collision; that the deplorable result was attributable to such a change of course on the part of the barque; and that if the barque had held her course, she would have passed the steamship on her starboard side; and that with side lights of the magnitude and character of those carried by the Belgenland, the green light of the steamship on such a night as that on which the collision occurred, should have been observed in time to show that the course of the steamship was taking her on the starboard side of the barque.

Fourth. As to the failure of the lookouts of the steamship to discover a green light on the starboard side of the barque, which was the side of that vessel towards the steamship before the barque altered her course, this respondent denies that any failure to see such a light is to be attributed to any want of care or watchfulness on the part of the lookouts of the steamship.

9 There was no fog, and although the full moon was behind the clouds, there was a light drizzly rain with passing showers, which produced a misty state of the atmosphere, which caused increased vigilance on the part of the lookouts and the officers of the steamship.

That the truth, as respondent believes, is that the barque was coming down on the steamship before the wind enveloped in a shower of rain and mist, which struck the steamship just before the collision, and which obscured the barque from the steamship at the critical moment when she approached the steamship, and that the failure to discover a vessel, produced by such a state of the atmosphere, is one which no skill or watchfulness on the part of lookouts and officers can guard against.

The respondent believes he may fairly appeal to the thorough discipline of his crew immediately after the collision—their prompt

obedience to the orders to launch the boats in the night, and with a heavy sea running, the utter absence of anything like confusion in immediately following out the orders at once given by the officer of the deck, as evidence of their attention to duties. The lookout man on the starboard side had been visited by the fourth officer in the few minutes immediately preceding the discovery of the barque, and was found alert and attentive, and the same officer himself had scanned, during that time, the horizon on the lookout station on the starboard side from which the barque first appeared, and had not seen any vessel or light, at which time the barque or her lights would have been seen, if they could have been seen from the steamship.

Fifth. Respondent further, for the information of the court, says: That the wind was about southwest, the course of the steamship was northwest by west half-west; the steamship was plunging into a heavy head sea, throwing the water over her turtle deck forward, and the head sails of the steamship were set with the sheets hauled flat aft, the boom being nearly amidship and drawing sufficiently to help to keep her from rolling.

Sixth. Respondent further denies that the libellant sus-
10 tained damage to the extent named in the said libel, and all and and every act of negligence with which the steamship is charged or which is suggested by the allegations of the said libel, and he humbly prays that your honor will be plased to pronounce against the libellants said demand and decree, the said libel to be dismissed with costs.

M. P. HENRY, *Proctor.*

Samuel Jackson, being duly affirmed according to law, deposes and says: That the facts stated in the foregoing answer are true to the best of his knowledge, information, and belief.

SAMUEL JACKSON.

Affirmed and subscribed before me, this seventeenth day of September, 1879.

[SEAL.] JOHN RODGERS,
Notary Public.

District Court United States, Eastern Dist. Penna. In Admiralty.

JENSEN *vs.* THE BELGENLAND.

And the proctor for the steamship Belgenland at the time of the filing of his answer to the libel of Theodore Jensen, master of the Norwegian bark Luna, by leave of the court, excepts to the jurisdiction of this honorable court in the cause of damage set forth in the said libel, and for cause of exception showeth:

That the alleged collision took place on the high seas, and not within the jurisdiction of the United States, between foreign vessels.

That the said steamship Belgenland is a Belgian vessel, belonging to the port of Antwerp, in the kingdom of Belgium, running in a regular line between Antwerp and the ports of New York and

Philadelphia; and that the bark Luna is a Norwegian vessel, and that no American citizen is interested in the bark or her cargo.

Wherefore he prays the court to dismiss the said libel and not to proceed further therewith in this cause, subject to which exception to the jurisdiction this answer is filed.

MORTON P. HENRY,
For Respondents.

11 And afterwards, to wit, on the 29th day of November, A. D. 1880, the opinion of the court is filed, in the words and figures following, to wit:

THE BELGENLAND.

On the 4th of August, 1879, between the hours of one and two o'clock in the morning, the barque "Luna," laden with sugar, under way from Porto Rica to Queenstown, in lat. 49° 33′ and long. 21° 43′, on a course, by the compass, southeast by east one-half east, with a fresh breeze from between southwest and west and west southwest, met the steamship "Belgenland" traversing the same course, by the compass, in an opposite direction, was run down by the latter vessel and sunk.

Was the steamship in fault? It was her duty to keep out of the barque's way. About this there is no controversy, nor, in my judgment, room for controversy. The presumption is, therefore, against her; the burden of proof is hers. She must show a sufficient excuse for the failure to keep off, or must answer for the loss.

The excuse set up and relied upon is two fold: first (in the language of the answer), "that the barque was coming down before the wind, enveloped in a shower of rain and mist, which struck the steamship just before the collision, and obscured the barque at the critical moment when she approached the steamship, and that the failure to discover a vessel, produced by such a state of the atmosphere, is one no skill or watchfulness on the part of the lookouts and officers can guard against;" and second, "that the barque changed her course previous to the collision, and the result is attributable to such change."

The first branch of this defense presents the question whether proper vigilance was exercised, and the failure to see the barque inevitable. And this involves a consideration of the state of the weather and atmosphere, the character of the steamship's lookout, the testimony of witnesses who describe the distance at which objects could be seen at the time, and the presence or absence of lights on the barque.

12 As respects the condition of the weather and atmosphere, there is no material disagreement in the testimony. The libel says, "there was a drizzling rain, with a fresh breeze from between southwest and west southwest," and *and* the answer says, "the breeze and character of the night were such as stated in the libel, except that there was some mist with passing showers." The moon was up, but hidden by clouds. There was little sea, though the

swell was heavy. The atmosphere was somewhat thick, and the night dark. There seems to have been no fog.

As respects the steamship's lookout, more might be said than I deem it necessary to say. That a lookout should have been maintained from the turtle-back under ordinary circumstances is plain. The reason assigned for omitting it, and relying upon a sight from the bridge, one hundred and eighty feet back, is the alleged occasional plunging of the bows into the sea, and the obstruction presented by spray at that point. That a sailor could have stood there with safety is admitted. It is asserted, however, that he could have seen nothing from that place. The night was such as to call for especial vigilance. Massin, a seaman, was placed on the starboard side of the bridge; Wismer, the second officer, was stationed on the opposite side, and Ledder, the fourth officer, at the after compass. The latter visited the bridge, and "looked around" for a few minutes from the starboard side shortly before the accident. The officers recognized the necessity for especial care; they conversed about it, and cautioned Massin respecting it. Wismer said to Ledder, that "it was a bad night to see vessels; go over to the other side of the bridge and tell the man there to keep a good lookout, and to look around himself; that if a man kept a good lookout he could see a vessel." Ledder says, he did as requested, and returned to Wismer just before the accident. Beyond this there was no vigilance. The number of men on lookout duty was not increased. The ship was kept up to eleven miles an hour (the same speed she was making before the weather changed). In view of the direction of the wind, a reduction of speed would doubtless have diminished the quantity of spray over the turtle-back. If by this means (a reduction of speed) an outlook could profitably have been maintained from that point, it certainly should have been. Speed is important; but human life is more important. When difficulties intervene to prevent a reasonably safe lookout (and it matters not whether this arise from the existence of fog, or other cause), the speed should be reduced, if by so doing the unusual danger of collision may be diminished. Where such difficulties arise from the existence of fog, the necessity of reducing the speed is not and cannot be questioned. And no valid reason can be assigned for a distinction between such cases and others, where the difficulty of seeing arises from other cause. The precaution is rendered necessary, and its observance required by the difficulty of maintaining a safe lookout, without regard to the cause from which it arises. Conceding the difficulties in the way of maintaining a safe lookout, on the occasion in question, to have been such as the respondent's witnesses describe, I find it difficult to avoid the conclusion that the rate of speed should have been reduced; and the experiment of a sight from the turtle-back tried. I incline also to the opinion that the number of men on lookout duty should have been increased. Had such precaution been observed, it is quite probable the accident would have been avoided. This inquiry need not, however, be pursued. The fact that the barque could have been seen, with the exercise of proper vigilance, earlier than she was, (of which I am fully convinced,) shows conclusively an ab-

13

sence of proper care. Wherein this consisted need not be determined.

The barque should have been seen earlier. That she could
14 have been, even without lights, seems to admit of little, if any, doubt. Wismer (of the steamship) says he could see a ship, without lights, the fourth of a mile off, at the time, and believed so then; Sodergren (also of the steamship) thinks a man with a sharp eye might have seen a ship, without lights, half a mile off; Lutz (of the steamship) says he saw the barque as she came up, and looked out the air port of his stateroom, a *third* time before reporting that she would strike; Peters (of the steamship) says he heard the report, and passed from below to the deck before she struck; Captain Jackson (of the steamer) says he did not lose sight of the wreck, (which King says was five hundred to six hundred yards away, and without lights;) Peters says he kept the wreck in view from the steamship until they left, and could see the mizzen-mast above the water; King (of the steamship) says, "when at the wreck, judging as near as I could of the distance, it was from five hundred to six hundred yards from the steamship, I could count every porthole;" Tonnesson (of the barque) says he saw the steamship's *sails* when she was three lengths away; Captain Simonson (of the barque) says he saw her *sails* as she came up, and after the collision, saw her constantly, as she clung to the wreck; Edwardson (of the barque) says he saw the steamship's *sails and rigging* as she came up, and kept her constantly in view from the wreck; Jensen (of the barque) says he also saw her from the wreck. That these witnesses may be inaccurate, and no doubt, are, respecting time and distance, must be admitted. Still there testimony is convincing that the barque, even without lights, might have been seen earlier than she was. With lights she could certainly have been seen (according to the concurrent testimony on both sides) from half a mile to a mile off. That her lights were burning is not, in my judgment, open to serious question. Simon-

son, her first officer, says he looked at them between twelve
15 and one o'clock, and saw them burning brightly. The starboard light was seen burning at the moment of collision. The other was not then in position to be seen. But the presumption (from the facts just stated) clearly is, that it also was still burning. No importance can be attributed to the libel's silence on this subject. The failure of the answer, when accounting for the accident, to suggest that the lights were not burning is more significant.

The conclusion is, therefore, unavoidable, that the barque could have been seen earlier then she was.

The respondent's argument, based on the inability of the barque's lookout to see the steamship's powerful side lights, as the vessels approached (pressed with great earnestness and ability), has received careful attention. The light in position to be seen was that on the starboard side. Why it was not seen, cannot now be known with certainty. Whether it was because of obstruction from the steamship's fore trysail, as argued by the libellant, cannot be ascertained. That it may have been, seems possible to the assessors as well as to myself. Not, of course, if the sail was held in proper position; but precisely what was its exact position the respondent's witnesses

differ about. That the inability to see the light, however, did not arise from atmospheric difficulties seems clear; unless, indeed, the weight of the evidence on both sides be disregarded. As already shown, much less powerful lights, and even objects without lights, could be, and were, seen at a greater distance than these lights were off at the time. The allegation that the barque was "enveloped in a shower of rain and mist, which hid her from view," is not supported by the evidence. The first branch of the defense (that the accident resulted from inability to see the barque, by the observance of proper care) therefore fails. So far from the evidence sustaining it, as an affirmative proposition, the contrary is shown to be the fact.

16 Did the barque improperly change her course? That she endeavored to change it at the moment of collision, and was partially successful, is admitted. This, however, is not important. Did she change it earlier? Her duty was to hold her course. All the surviving crew who can speak on the subject say she did hold it. The testimony of the man at the wheel cannot be had. He was drowned. The mate on duty says he gave the order "to keep her steady and be careful;" that he directed no change, and that none was made, until immediately before the accident, when collision was imminent. It is argued, however, from the testimony of the mate and the lookout, that the vessels were moving on parallel courses, and that had the barque not changed her direction the collision would not have occurred. These witnesses say the steamship, when first observed, seemed to be "right ahead, but a little on the barque's starboard bow." The language of the mate is, she was "right ahead, but a little bit on the starboard side;" the lookout says she appeared to be "right ahead," but a little on the starboard side of the jib-boom. He reported her at the time to be "right ahead," as the mate and Edwardson (who carried the report) state. He further says that as they approached she seemed "to draw a little more on the lee-bow," and come up in that position—her starboard light, a moment before the collision, showing to the barque's port light. From the testimony the respondent's counsel argue that the barque improperly changed her course southward, and ran across the steamship's bows. This argument is legitimate and forcible, and was pressed with great ability. In the absence of the direct and positive testimony, before referred to—that the barque did not change—it would be entitled to considerable weight. Even if it stood alone, however, it would not be a safe guide. Precisely how the vessels approached cannot be now known. To all who saw them prior to the moment pre-

17 ceding collision (Tonneson, the barque's lookout; Simonson, her first mate; Edwardson, a member of her crew; and Lutz, a passenger on the steamship), they appeared to be moving virtually on the same course; and coming up nearly, if not quite, "head on." Lutz says, when they came together "her bow met our bow," and he repeats this expression. At the moment of the catastrophe, however, it seems to be clear that the headings of the vessels were such as to show the steamer's green light to the barque's red. Whether this was so before the course of the barque was affected by the first contact (for it is quite possible she was thus turned to some extent, when

reached, before the shock was perceptible) cannot be known. The position of the lights and her apparent slight change when approaching—described by the witnesses—may possibly be accounted for by the impracticability of keeping the vessels (especially the barque) steadily on a direct course, under existing circumstances of wind and sea. The latter vessel would necessarily yaw more or less; and it is possible, if not probable, that the steamship did not hold her course constantly, with entire steadiness. Both would incline to windward, and it is not impossible, nor very improbable, that in moving on the same general course they would frequently head as they are described to have done at the moment of collision. Very little variation from a direct course would be necessary to bring the lights into the position stated. It does not follow, however, from the testimony, that the general courses of the vessels were either parallel or the same. They may have been slightly intersecting; the evidence is not entirely inconsistent with the idea that they were. The indications of the compass cannot be relied upon with certainty, where the question is so delicate. This is fully shown and explained by the answers of the assessors. But whether these suggestions respecting the movements of the vessels are well founded or not, the inferences on which the allegation, that the barque's course
18 was changed as she came up, rests, are too uncertain to be accepted; especially against the direct and positive testimony to the contrary before referred to.

It is proper to say, in this connection, that I would place very little reliance on the statements of the mate and other members of the barque's crew, made at the time of their rescue, if they differed from the testimony of these witnesses subsequently taken. Their minds were too much disturbed to admit of careful statement, and those who heard them were hardly in condition for accurate understanding or recollection of what was said.

Nor would I deem it safe to attach much weight to the statements subsequently obtained, while the rescued men were on board the steamship. Conceding the propriety of interrogating them as was done, their situation, and their imperfect understanding of the language in which they were interrogated, and made answer, and the fact that the answers were not taken literally, in the terms they employed, would render it unsafe to rely on the information thus obtained as a means of contradicting, or qualifying, what they afterwards said on oath. In my judgment, however, no material disagreement exists between the statements referred to, and the testimony of the witnesses subsequently obtained.

A decree must be entered in favor of the libellant.

And on the same day certain interrogatories of the court propounded to William Gallagher and George T. Hewitt, assessors, together with their answers thereto, being filed, are in the words and figures following, to wit:

19 THE BELGENLAND.

Captains Gallagher & Hewitt will please furnish me answers to the following questions:

1. Supposing the barque "Luna" to have been running free, with the wind—a stiff breeze—on her starboard quarter, and a heavy swell in the sea, would the rudder keep her steady on a direct line or course? If not, how much would the yawing be likely to carry her off with proper attention to the wheel?

2. What effect, in this respect, would the wind and swell have on the steamship's course, running in the opposite direction, at eleven miles an hour, with sails set (so as to have the benefit of the wind), and having a heel of 12° to starboard.

3. Supposing the respective compasses of the vessels indicated the same course, in opposite directions, would it follow that the course was the same? State how much compasses vary when placed side by side; and how much the steamship's compass would probably be effected by attraction of the iron in the vessel. State whether the indication of the compasses, under the circumstances above supposed, in this interrogatory (that the vessels were on the same course), would be irreconcilable with the idea that their courses were slightly *intersecting?*

4. Supposing the steamship, when first seen from the barque, to have been a mile away, that she appeared to starboard of a line directly ahead, that as the vessels approached she seemed to be drawing towards the barque's starboard-bow, and when they met, their respective headings were such as to show the steamer's starboard light to the barque's port light. Might this change occur with proper care over the wheels of the respective vessels, and while each was endeavoring to keep her course, the wind and sea being as before stated? If it might so occur, please to explain why, in your judgment, it might?

5. Supposing the steamship's bows to be occasionally plunging into the sea, and spray to be flying over the turtle-back, but not to such extent as to render it unsafe for a seaman to stand there, should a lookout have been stationed there—the night being dark and the atmosphere such as to create apprehension in the officers' minds respecting the likelihood of seeing vessels as they approached?

6. Supposing the circumstances to be such as stated in the interrogatory immediately preceding, would a diminution of the steamer's speed have tended to reduce the quantity of spray over the turtle-back, and to improve the prospect of maintaining a safe lookout from that part of the vessel?

7. Supposing the circumstances to be as stated in the fifth interrogatory, would ordinary care and vigilance have required the speed to be reduced and a lookout tried from the turtle-back?

8. Looking at the model of the "Belgenland," and supposing the fore trysail to be set somewhat lower (as is admitted it should be to correspond with the sail on the vessel), state whether it was possible for this sail to have gotten in front of, and hidden the starboard light from, the barque on the night of the collision, supposing the sail to have been set and trimmed as stated by the respondent's witnesses, whose testimony respecting this will be handed you herewith?

WM. BUTLER.

21 To the Honorable William Butler, judge of the district court of the United States for the eastern district of Pennsylvania:

The undersigned herewith respectfully submit the following answers to the interrogatories in compliance with your request:

1. Answer. A barque running free, with a stiff breeze on the starboard quarter, and a heavy swell, allowing that she is a fair steering vessel, would yaw each side of her course from one-half to one point, with a constant tendency to cat up into the wind, except where she takes what is termed a wipe off or sheer to leeward, which only happens occasionally, therefore her course would be a crooked one, and the result that she would probably make from a quarter to a half point to windward of that steered by compass.

2. Answer. The propelling power of the steamer, not being dependent upon sails, the course made should be the same as that steered, except the swell of the sea might set her a little to leeward bodily, and, having a heel to starboard of 12°, would have a tendency to divergence from the course steered by compass, and to bring the ship's head a little to windward.

3. Answer. It does not follow that the vessels were on the same course because the compasses on board so indicated. Variations in compasses are very common. That on the steamship would be affected by attraction of the iron, and the one on the barque would probably not agree with it precisely if the two were placed side by side, either there or elsewhere. Out of half a dozen compasses, adjusted with ordinary care, three may not be found to agree precisely. The indications of a compass are not, therefore, a sure guide to the precise direction of the vessel, though it will approximate very nearly. While the compasses of two vessels, going in opposite directions, indicate the same courses, the *true* courses of the vessels may be intersecting; very slight variations in the compasses would be necessary to produce this result.

22 4. Answer. Supposing the circumstances to be as stated in the fourth interrogatory, the vessels might come together in the positions stated, even with the exercise of proper care over their respective wheels, and while each was endeavoring to keep her course. This might occur either from the yawing of the vessels, and especially the barque, and their constant tendency (especially the barque) to cat up into the wind, which would, or might, frequently occur on their course, and set their heads so as to show the steamer's green light to the barque's red light, if they were at the time in the vicinity of each other.

5. Answer. Supposing the circumstances to have been such as are stated in the fifth interrogatory, the speed of the vessel should have been diminished, and a lookout placed on the turtle-back. A diminution of speed would have decreased the amount of spray. If the officers had apprehensions about the ability to see approaching vessels, ordinary prudence would have required, in addition, an increase in the number of lookouts.

(This answer covers the sixth and seventh interrogatories, as well as the fifth.)

8. Answer. In answer to this interrogatory, the tack of the fore trysail, being somewhat lower than that shown on the model of the "Belgenland," it is quite possible that, with the heeling of the ship and the bagging of that sail, it would obstruct the green or starboard light from the barque, and also obstruct the barque from the lookout on the bridge.

Respectfully submitted, WM. GALLAGHER.
GEO. T. HEWITT.

Philadelphia, November 23d, 1880.

23 And afterwards, to wit, on the 14th day of February, A. D. 1881, the case having been heard on the pleadings and proofs, and having been argued by the proctors of the respective parties, and due deliberation being had in the premises, it is ordered, adjudged, and decreed by the court, that the libellant recover from the respondent, Samuel Jackson, and his stipulators, Joseph D. Potts, William G. Warden, Edward N. Wright, and James A. Wright, his damages for the collision mentioned in the libel, amounting to fifty thousand two hundred and forty-eight dollars and twenty-three cents ($\$50{,}248\frac{23}{100}$), with costs, to be taxed.

And afterwards, to wit, on the 18th day of February, A. D. 1881, the respondent, by his proctors, Morton P. Henry and Henry R. Edmunds, Esqs., prays leave to appeal from the decree of the district court of the United States in this cause to the next circuit court of the United States for the eastern district of Pennsylvania, and the same is allowed upon the usual conditions.

24 And afterwards, to wit, on the 25th day of March, A. D. 1881, the libellant, by his proctors, come into our said court here and ask the court to amend the decree entered and filed in the district court, and the same having been allowed, is in the words and figures following, to wit:

In the Circuit Court U. S.

JENSEN *vs.* "THE BELGENLAND."

And now, this twenty-fifth day of March, A. D. 1881, comes Henry Flanders and J. Langdon Ward, Esqs., proctors for the several parties interested in the ship, freight, cargo, and effects lost by said collision, and pray that the decree may be amended so as to set forth the various items of loss included in the assessment of damages according to the schedule hereto annexed, which is made a part of the decree; and the proctors for respondent not objecting, it is ordered that the said decree be amended.

25 "THE BELGENLAND."

Cargo	204 hogsheads and 80 barrels sugar		$11,723 21
	Interest from July 16th, 1879, to February 14th, 1881		1,110 40
	230 hogsheads sugar		12,584 98
	Interest from July 26th, 1879		1,172 49
	98 hogsheads sugar		5,362 24
	Interest on same, August 4th, 1879		492 42
	Advance on account freight, £46.14.8		226 19
	Interest from October 3d, 1879		18 54
Freight on 427 tons 16.3.27 @ £2, £855.14.0 @ $4.84		$4,139 41	
Less advance, £46.14.8.			
Probable expenses earning, £120		807 00	
			3,332 41
Interest from October 3d, 1879			273 25
Entering protest at Philadelphia			10 00
Cables, telegram, and postage			83 00
Ship stores			655 00
Interest from October 3d, 1879			56 23
Men's effects			948 50
Interest from September 3d, 1879			82 52
Value of vessel			11,000 00
Chronometer			108 00
Interest on $11,108 from October 3d, 1879			910 94
Expense returning crew			69 50
Interest on same			5 86
Money in master's possession			30 00
Interest on same from October 3d, 1879			2 55
			$50,258 23
Error in calculation freight			20 00
			$50,278 23

26 *Owners of Ship, Freight, and Ship Stores.*

R. Anderson, O. Anderson, A. Korndson, N. A. Nielson, Abr. Nielson, G. Korndson, Hans Groins Euke, H. Thorsen, S. Simonsen, K. Thorbyornsen, J. Bung, T. Jensen.

Owners of Cargo.

The Cortsborn Sugar Refining Company.

27 And afterwards, to wit, on the 27th day of June, A. D. 1881, this cause coming on to be heard on an appeal from the district court of the United States, and having been argued by the proctors for the respective parties, the court held the same under advisement.

28 And afterwards, to wit, the 10th day of October, A. D. 1881, the court, by Hon. William McKennan, circuit judge, file finding of facts and opinion, which, being read, is as follows, to wit:

In the Circuit Court, East. Dist. of Penna. In Admiralty.

Appeal from the decree of the Dist. Court.

THE BARK LUNA *vs.* THE STEAMSHIP BELGENLAND.

McKENNAN, Cir. J.:

Finding of Facts.

1. Between one and two o'clock on the morning of September 3, 1879, in mid ocean, a collision occurred between the Norwegian barque Luna, on her voyage from Humacao, in Porto Rico, to Queenstown or Falmouth, and the steamship Belgenland, on a voyage from Antwerp to Philadelphia, which resulted in the sinking of the barque, in the total loss of the vessel and her cargo, and in the drowning of five of her crew.

2. The wind was between S. W. and W. S. W., and there was not much sea, but a heavy swell. The barque was running free, heading S. E. by E. half E., having the wind on her starboard quarter. All her square sails were set except her main royal, and she carried also her fore, main, and mizzen stay sails and inner jib. Her yards were braced a little, her main sheet was down, but the weather clew was up. She was making about seven and one-half knots. Her watch on deck consisted of the first mate and three men; an able seaman was on the lookout on the top-gallant forecastle, and a capable helmsman was at the wheel.

She carried a red light on her port side and a green light on her starboard side, properly set and burning brightly, which could be seen, on a dark night, and with a clear atmosphere, at least two miles. The character and location of these lights conformed to the regulations of the barque's nationality, which are the same as those of the British Board of Trade. About 1.45 o'clock the lookout sighted the white masthead light of a steamer right ahead, distant, as he thought, about a mile, and reported it at once to the mate, who cautioned the man at the wheel to "keep her steady and be very careful," and the barque held her course.

No side lights on the steamer were seen from the barque, but, as the vessels approached each other, the white light of the steamer gradually drew a little on the port bow of the barque for three or four minutes. The mate of the barque seeing the steamer's sails, and that she was heading directly for the barque, was close aboard of her, and reasonably apprehending that a collision was inevitable, ordered the barque's helm hard a-port. In a few seconds the steamer's starboard light came into view, and in another instant she struck the barque on her port side, cutting her in two obliquely from the after part of her fore rigging to the fore part of the main rigging.

3. The Belgenland was steering N. W. by W. half W. by compass, and making about eleven knots. Her second officer had charge of

the deck, and his watch was composed of ten able seamen, two quartermasters, the second boatswain, and the fourth officer. One able seaman was stationed on the lee or starboard side of the bridge as a lookout. The second officer was on the bridge. The fourth officer was stationed at the after or standard compass, which was near the mizzen-mast, but at the time was on the bridge, having come their to report a cast of the log. A quartermaster was at the wheel. The rest of the watch were underneath the turtle-back or top-gallant forecastle.

The steamer was four hundred and sixteen feet long and about thirty-eight feet beam. The bridge was one hundred and fifty or one hundred and eighty feet from her bow, and was six or seven feet higher than the top of the turtle-back, which was about twenty-five feet above the water.

The steamer had her fore, main and mizzen try-sails, fore stay sail and jib set and drawing, and probably her jigger also. She heeled to starboard from ten to fifteen degrees.

4. The only lookout on the steamer was on the bridge. None was on the turtle-back, although it would have been entirely safe to station one there, for the alleged reason that the vessel was plunging into a head sea, and taking so much water over her bows that he would have been of no use there.

5. The barque was not seen by those in charge of the steamer until just at the instant of the collision, when the second officer saw her head sails just across the steamer's bow, the lookout in the lee side of the bridge saw her after sails and stern.

6. The moon was up, but was obscured by clouds. There was no fog, but occasional rain with mist, and the wind was blowing from the S. W. to W. S. W.

7. Objects could be seen at the distance of from five hundred yards to a mile. The masthead light of the steamer was sighted and at once reported by the lookout on the barque, at the distance of about a mile; the port light of the barque was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and reported to his room mates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion ladder, cross the deck, and reach the steamer's rail; after the collision, the mizzen-mast of the barque was all of her above water, and this was distinctly seen from the steamer when she was at the distance of five hundred yards from it.

8. The damages caused by the collision were assessed at $50,248.23.

Opinion.

The following conclusions are fairly deducible from the evidence and the facts found:

1. That the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision.

2. That the lookout on the barque saw the steamer when she was nearly a mile distant, and she was held steadily on her course, and that she thereby fulfilled her legal obligation. Even if her helm

was ported, it was at a time and under circumstances which did not involve any culpability on her part.

3. That it was the duty of the steamer to keep out of the way of the barque, and, to that end, so to change her course as to preclude all danger of collision.

4. That the barque could and ought to have been seen by the steamer when they were sufficiently distant from each other to enable the steamer to give the barque enough sea room to avert any risk of collision. In this failure to observe the barque the steamer was negligent.

5. No satisfactory or sufficient reason is furnished by the respondent's evidence for this failure of observation. If it resulted from the inattention of the steamer's lookout, or because their vision was intercepted by her fore try-sail, she was clearly culpable. If it is explicable by the condition of the atmosphere, no matter by what cause it was produced, it was the steamer's duty to reduce her speed, and to place a lookout on her turtle-back. An omission to observe these precautions was negligence.

But, considering the proof that the barque held her course, and that the steamer might have seen her by proper vigilance, when suitable precaution against collision might have been taken, a mere speculative explanation of the steamer's presumptive culpability cannot be accepted as sufficient.

I do not deem it necessary to enforce these conclusions by extended argument. The whole case is so clearly and satisfactorily treated by the learned judge of the district court, that I adopt his opinion, and affirm the decree entered by him.

A decree will, therefore, be entered in this court against the respondent for $50,248.23, with interest from March 25, 1881, and costs.

29 And afterwards, to wit, on the 14th day of October, A. D. 1881, the court entered the final decree in the case; which, being read, is as follows, to wit:

Circuit Court of the United States, Eastern District of Pennsylvania.
No. 2. April Session, 1881.

JENSEN, Master of the Barque "Luna," Libellant and Appellee,
vs.
THE STEAMSHIP BELGENLAND, whereof SAMUEL JACKSON is Master, Respondent and Appellant.

And now, this 14th day of October, A. D. 1881, this cause having been heard on the pleadings and proofs, and having been argued by the proctors for the respective parties, and due deliberation being had in the premises, it is ordered, adjudged, and decreed that the libellant recover for himself and the other parties in interest from the respondent, Samuel Jackson, and his stipulators, Joseph D. Potts, William G. Warden, Edward N. Wright, and James A.
30 Wright, his and their damages for the collision mentioned in the libel, amounting to fifty thousand two hundred and

seventy-eight dollars and twenty-three cents ($50,278\frac{23}{100}$), with interest from the twenty-fifth day of March, A. D. 1881, amounting to a further sum of sixteen hundred and seventy-five $\frac{91}{100}$ dollars ($1,675.91), to the date of this decree, and aggregating the sum of fifty-one thousand and nine hundred and fifty-four $\frac{14}{100}$ dollars ($51,954.14), payable as follows:

To J. Langdon Ward, Esq., proctor for the Cortsborn Sugar Refining Company, owners of the cargo, the sum of thirty-three thousand seven hundred and eighty dollars and eighteen cents	$33,780 18
To Henry Flanders, Esq., proctor for the owners of barque Luna, the following sums, viz:	
For freight, thirty-seven hundred and forty-six $\frac{50}{100}$ dollars	37,046 50
For protest, cablegrams, and ship-stores, eight hundred and thirty-one $\frac{3}{100}$ dollars	831 03
For value of vessel and chronometer, twelve thousand four hundred and nineteen and $\frac{56}{100}$ dollars	12,419 56
31 To Henry Flanders, Esq., proctor for T. Jensen, S. Simonson, Tonnes Tonnesen, Carl Edwardson, and Johan Neilson, for their personal effects, the sum of one thousand and sixty-five $\frac{38}{100}$ dollars	1,065 38
To Henry Flanders, Esq., proctor for T. Jensen, master, for money in his possession, the sum of thirty-three $\frac{62}{100}$ dollars	33 62
To Henry Flanders, Esq., proctor for Count Lewinhaupt, Minister of Sweden and Norway, for expenses of returning crew, the sum of seventy-seven and $\frac{87}{100}$ dollars	77 87
	$51,954 14

With costs, to be taxed.

(Signed) BY THE COURT.

(Endorsed:) 2. April Sess., 1881. U. S. C. C. Jensen *vs.* The Belgenland. Decree. Entered and filed October 14, 1881.

32 And afterwards, to wit, on the 19th day of October, A. D. 1881, came the respondent, by his proctors, and, leave of the court being first had and obtained, file a motion for reargument on plea to the jurisdiction, which said motion, being read, is as follows, to wit:

Circuit Court of the United States in and for the Eastern District of Penna. In Admiralty. No. 2. April Sess., 1881.

THEODORE JENSEN, Master of the Norwegian Bark "Luna,"

vs.

THE STEAMSHIP BELGENLAND.

And now, October 19th, 1881, Morton P. Henry and Henry R. Edmunds, proctors for the steamship "Belgenland," pray for a rear-

gument of this cause on the pleas to the jurisdiction filed therein; *i. e.*, as to the jurisdiction of the admiralty courts of the United States in this cause growing out of a collision between foreign vessels happening on the high seas and not within the waters of the United States; it is therefore ordered that the said cause be set down for re-argument on the said plea, the decree heretofore entered to be
33 reopened until the question of jurisdiction is decided.

(Signed) BY THE COURT.

(Endorsed:) 2. April sess., 1881. U. S. C. Court. Jensen *vs.* The Belgenland. Motion by respondent for reargument on plea to the jurisdiction and order. Entered and filed October 19, 1881.

34 And afterwards, to wit, on the 22nd day of October, A. D. 1881, come the parties aforesaid, by their proctors aforesaid, and the motion for reargument on the plea to the jurisdiction being argued, the court file the following findings of fact and conclusions of law, and the order of the court thereon, as follows, to wit:

In the Circuit Court of the United States, Eastern District of Pa.

THEODORE JENSEN, Master of the Norwegian Bark "Luna,"
vs.
THE STEAMSHIP BELGENLAND.

And now, October 22nd, the above cause came on to be heard on the pleas to the jurisdiction and was argued by counsel.

And thereupon the following facts were found:

That the collision in question occurred between the Luna, a Norwegian barque, and the steamship Belgenland, which steamship was owned by the Société Anonyme de Navigation Belge-Américaine, a Belgian corporation or association created by the laws of the
35 Kingdom of Belgium, and that the said steamship was a Belgian vessel in point of nationality, sailing under the Belgian flag; and that the collision occurred on the high seas and not within the waters of the United States.

Conclusions of Law.

That the admiralty courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners and of different nationalities; and that the plea to the jurisdiction is overruled.

Endorsed: No. 2. April sess., 1881. C. C. U. S., E. D. of Pa. Theodore Jensen *vs.* The Steamship Belgenland. Finding of facts and conclusions of law as to the jurisdiction. Ordered, that the within findings be added to the findings heretofore filed, and that the decree made in the case stand. (Signed) By the Court. Oct. 22, '81. Entered & filed October 22, 1881.

36 And afterwards, to wit, on the 22nd day of October, A. D. 1881, came the respondent, by his proctors, and files a petition

for an appeal to the Supreme Court of the United States, which said petition, being read, is as follows, to wit:

THEODORE JENSEN, Master of the Norwegian Bark Luna, Appellee,
vs.
THE STEAMSHIP BELGENLAND, her tackle, apparel, and furniture, The Société Anonyme de Navigation Belge-Américaine, Claimants and Appellants.

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

The petition of Samuel Jackson, claimant, on behalf of the Société Anonyme de Navigation Belge-Américaine, respectfully, showeth:

That on the sixteenth day of September, 1879, the above-
37 named Theodore Jensen filed his libel in the district court of the United States in and for the eastern district of Pennsylvania against the steamship Belgenland, her tackle, apparel, and furniture, in a cause, civil and maritime, for the recovery of damages sustained by the Norwegian bark Luna, and her cargo, by collision with the steamship Belgenland upon the high seas.

That the said steamship Belgenland was arrested by process issuing out of the said court upon the said libel, and was discharged upon your petitioner's filing their claim with stipulations. And such proceedings were therein and thereafter had in said cause that, on the fourteenth day of February, A. D. 1881, a final decree was pronounced by the district court, wherein it was, in substance, adjudged that the said libellants recover against the steamship Belgenland the sum of fifty thousand two hundred and seventy-eight $\frac{23}{100}$ dollars, together with costs.

That after such a final decree your petitioner duly appealed there-
from to the circuit court of the United States for the eastern
38 district of Pennsylvania, and the said cause was removed into the said circuit court and there tried anew, and such proceedings were had in said circuit court that afterwards, on the fourteenth day of October, A. D. 1881, the said circuit court made a final decree, whereby it was decreed that the said decree of the district court be in all things affirmed with costs, and a decree was rendered against the steamship Belgenland and the claimants and their stipulators in the sum of fifty-one thousand nine hundred and fifty-four dollars $\frac{14}{100}$, with costs, which said decree of the circuit court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore this appellant appeals from the whole of the said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court and the pleadings, proofs, records, and proceedings of the said court
in the said cause may be sent to the Supreme Court of the
39 United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed

and a decree made dismissing said libel with costs, and such other decree as to the said Supreme Court may seem just.

(Signed) MORTON P. HENRY,
" HENRY R. EDMUNDS,
Proctors for Appellant.

(Endorsed:) No. 2. April sess., 1881. Circuit court U. S., east. dist. of Pa. Theodore Jensen *vs.* The Belgenland. Appellant's petition for appeal to the Supreme Court. It is ordered that the appeal be allowed. Stipulations to be entered in the sum of $70,000.

40 *Bond on Appeal.*

In the Circuit Court of the United States, Eastern District of Pennsylvania.

THE STEAMSHIP BELGENLAND and SAMUEL JACKSON, Master, Claimant and Appellant,
vs.
THEODORE JENSEN, Master of the Norwegian Bark "Luna," Appellee.

Know all men by these presents, that we, Samuel Jackson, as principal, James A. Wright, Edward N. Wright, William G. Warden, and Joseph D. Potts, of the city of Philadelphia, are held and firmly bound unto Theodore Jensen, master of the bark "Luna," appellee, in the sum of seventy thousand dollars, to be paid to the said appellee: for the payment of which, well and truly to be made, we do bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-second day of October, A. D. 1881.

Whereas the above-named appellant has presented an appeal to the Supreme Court of the United States, at Washington, from
41 the decree of the circuit court of the United States in and for the eastern district of Pennsylvania against the steamship Belgenland and the stipulators in the above-entitled cause:

Now, therefore, the condition of this obligation is such, that if the above-named appellant shall prosecute his appeal with effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

SAMUEL JACKSON, [SEAL.]
By his Attorney-in-Fact, James A. Wright.
JAMES A. WRIGHT. [SEAL.]
EDW'D N. WRIGHT. [SEAL.]
WILLIAM G. WARDEN. [SEAL.]
JOSEPH D. POTTS. [SEAL.]

Signed, sealed, and delivered in presence of—
SAMUEL BELL.
W. VON A. WILLIAMSON.

Approved.
(Signed) W. McKENNAN, *Cir. Judge.*

42 (Endorsed:) No. 2. April Sess., 1881. C. C. U. S., E. D. of Pa. Jensen, master, libellant and appellee, *vs.* S. S. "Belgenland." Bond *sur* appeal. Filed October 24, 1881.

43 THE UNITED STATES OF AMERICA, *ss:*

To Theodore Jensen, master of the Norwegian bark "Luna," Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein The Steamship "Belgenland," whereof Samuel Jackson is master, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this 24th day of October, in the year of our Lord one thousand eight hundred and eighty-one.

W. McKENNAN, *Cir. Judge.*

43½ Service accepted, Oct. 24, 1881.

HENRY FLANDERS,
Proctor for Theodore Jensen, Master of the Norwegian Barque "Luna."

44 And afterwards, to wit, on the 11th day of November, A. D. 1881, the appellant, by his proctors, come into our said court here, and files his bill of exceptions, sealed by the court, in the words following, to wit:

Be it remembered that on the third day of March, 1881, of April sessions 1881, number 2, of the circuit court of the United States in and for the eastern district of Pennsylvania, came Samuel Jackson, claimant on behalf of the Société Anonyme de Navigation Belge-Américaine, owners of the steamship "Belgenland," and entered on appeal from the decree of the district court of the United States in and for the said district, in a certain cause of collision, civil and maritime, wherein Theodore Jensen, master of the Norwegian bark "Luna," was libellant, and the steamship "Belgenland," and the said Samuel Jackson, claimant, were respondents, whereby the said district court had condemned the steamship "Belgenland" and the stipulators for the damage suffered by the owners of said bark,
45 and of her cargo, and by those on board thereof, by reason of the said collision, in the sum of $50,278 $\frac{23}{100}$.

And afterwards, to wit, at the sessions of the said circuit court, held at Philadelphia, before the Hon. William McKennan, on the 27th day of June, A. D. 1881, the said cause came on for argument on libel, answer, and proofs, (*prout* the same.) At which time, came as well the proctors and advocates for the libellant, and the proctors and advocates for the respondent, and thereupon the proctors for the libellant, to maintain the libel and issue on their behalf to be main-

tained, read the said libel and the several depositions of Tonnes Tonnesson, Simon Simonson, Johann Neilson, Karl Edwardson, Theodore Jensen, Frank Lutz, Harry Frank, (*prout* the same.)

And upon the said argument, the proctors and advocates for the respondent then and there read the answer of Samuel Jackson,
master and claimant of said steamship Belgenland, to the said
46 libel, and the depositions of Peter King, Samuel Jackson, Godfrey Ledder, Otto Wismer, Lewis Massin, Joseph Padavic, W. B. Sodegrin, Charles H. T. Collis, Samuel C. Perkins, John P. Darrah, George H. Barker, Jacob Peters, John W. Shackford, Henry Morrison, William G. Randall, George B. White, Frederick Rodgers, Robert Leitch, Michael Murphy, Henry Pursell, (*prout* the same.)

And the said cause having been fully argued as aforesaid, the court held same under advisement; and afterwards, to wit, on the tenth day of October, 1881, the court delivered an opinion, which said opinion was preceded by a statement of facts. The statement of facts and opinion are in the following words: (*prout* the same and decree.)

47 And afterwards the proctors and advocates for respondent, came before the court and prayed for a reargument of the said cause on the plea of the jurisdiction of the admiralty court of the United States, in causes growing out of a collision between foreign vessels happening on the high seas, not within the waters of the United States. And it was thereupon ordered that the said cause be set down for reargument of said plea, the decree heretofore entered to be opened until the question of jurisdiction is decided.

And the said cause came on to be heard October 22nd, 1881, on the said plea of jurisdiction, and was argued by counsel. And thereupon the court found the following facts:

Statement of Facts.

That the collision in question occur-ed between the "Luna," a Norwegian bark, and the steamship Belgenland, which steamship was owned by the Société Anonyme de Navigation Belge-Américaine, a Belgian corporation or society created by the laws of the Kingdom
of Belgium; and the said steamship was a Belgian vessel,
48 in point of nationality, sailing under the Belgian flag, and that the collision occurred on the high seas, and not within the waters of the United States.

Conclusion of Law.

That the admiralty courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners and of different nationalities, and that the plea of the jurisdiction is overruled.

And thereupon the proctors and advocates for the respondents did then and there except to the aforesaid opinion of the court, and the several conclusions of law, as to the facts there found; and the said proctors and advocates for respondent did then and there tender this bill of exceptions to the opinion of said court, and re-

quested the seal of the said judge should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge did put his seal to this bill of exceptions, this 9th day of Nov., 1881.

(Signed) W. McKENNAN. [L. S.]

49 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleadings, opinion, decree, appeal to the circuit court, amended decree, findings of facts, opinion, decree, findings of facts and conclusions of law, and order as to the plea to the jurisdiction, petition for an appeal to the Supreme Court of the United States, and order allowing appeal, bond *sur* appeal, citation, and bill of exceptions, in the case of Theodor Jensen, master, &c., against the Steamship Belgenland, whereof Samuel Jackson is master, of April session, 1881, No. 2, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name
50 and affixed the seal of the said court, at Philadelphia, this 26th day of November, A. D. 1881, and of the Independence of these United States the 106th.

[SEAL.]

JAMES BELL,
Clerk Circuit Court U. S.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 169. The Steamship "Belgenland," her tackle, apparel, &c., Samuel Jackson, master, and the Société Anonyme de Navigation Belge-Américaine, claimants, appellants, *vs.* Theodore Jensen, master of the Norwegian bark "Luna." Filed 28th November, 1881.

SUPREME COURT, U.S.
FILED
APR 23 1888
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

The Steamship "Belgenland," Samuel Jackson, Claimant, Appellant,	Of October Sessions, 1882.
vs.	
Theodore Jensen, Master of the "Luna," Appellee.	No. 788.

The petition of William G. Warden, Joseph D. Potts, James A. Wright, and Edward N. Wright, stipulators for Samuel Jackson, claimant of the Belgian steamship "Belgenland," in a cause of collision, at the suit of Theodore Jensen, master, now pending in the Supreme Court of the United States, on an appeal taken by the claimant and appellant from a decree of the Circuit Court of the United States for the third Circuit and the Eastern District of Pennsylvania, showeth:—

That on the fourteenth day of October, A. D. one thousand eight hundred and eighty-one, a decree was entered in the Circuit Court of the United States for the Eastern District of Pennsylvania, in the said case, in the following words:—

"And now this fourteenth day of October, 1881, this cause having been heard on the pleadings and proofs,

and having been argued by the proctors of the respective parties, and due deliberation being had in the premises, it is ordered, adjudged, and decreed that the libellant recover for himself and the other parties in interest from the respondent, Samuel Jackson, and his stipulators, Joseph D. Potts, William G. Warden, Edward N. Wright, and James A. Wright, his or their damages for the collision mentioned in the libel, amounting to fifty thousand two hundred and seventy-eight dollars and twenty-three cents, with interest from the twenty-fifth day of March, 1881, amounting to a further sum of one thousand six hundred and seventy-five dollars and ninety-one cents, to the date of this decree, and aggregating the sum of fifty-one thousand nine hundred and fifty-four dollars and fourteen cents, payable to the several parties in interest," according to a table therein set forth.

On the same day an appeal to the Supreme Court of the United States, was prayed by the claimant, and granted in open court, and the same was duly perfected by the claimant giving bond in $70,000, with the same stipulators as sureties, conditioned that the claimant would prosecute his appeal with effect. Such sureties were duly approved according to law, and the record on appeal was in due season filed in the Supreme Court of the United States, where the cause is pending, as appears by the records of this court.

The said stipulation was conditioned in the following words: "Now, if the said claimant shall and will truly abide by all orders, interlocutory or final, of the said court and of any appellate court in which the said suit may be hereafter depending, and shall fulfil and perform the judgment or decree which may be rendered in the premises, and also pay all costs, &c., this stipulation shall be void."

That the said stipulation was *not* taken by the marshal under Section 941, Revised Statutes of the United States:

But was taken by the court which allowed process, to arrest the vessel, by virtue of the powers of the Courts of Admiralty to release a vessel arrested, on stipulations for value or in a sufficient amount to cover the libellant's claim being entered and approved by the court; and the steamship was, by the order of the court in the said cause, by its writ to restore, returned to the claimant. And that such practice has been uniformly pursued in the Courts of Admiralty of the said district, prior and subsequently to the passage of the act of the third day of March, 1847, incorporated in the Revised Statutes of the United States, 941.

Your petitioners as sureties for the said claimant, presented a petition to the Circuit Court of the United States in the said cause, on the fourteenth day of April, 1883, praying the court to relieve the petitioner's real estate from the lien of the said decree, and upon such terms as the court should deem proper in the premises.

A certified copy of this petition, so presented, and of the order prayed, is herewith presented.

And the court, after argument, declined to interfere, by an order made on the sixteenth day of April, in the following words:

"And now, April 16th, the court declines to allow the application *sur* petition filed April 14th, 1883, upon the ground that the appeal taken to the Supreme Court of the United States, and the removal of the record thereto supersedes all power of this court in the premises, and hence that tribunal is the only one which has authority to grant the relief asked for."

Your petitioners are greatly hindered in the enjoyment of their respective real estates lying in the Eastern District of Pennsylvania, and that purchasers have refused to take titles of real estate lying within the same by reason of the decree as aforesaid. They therefore pray this court by an order in this cause to grant

relief, by setting aside the said decree as a lien on the real estate of the petitioners, on such terms as the court shall be pleased to pronounce just and equitable to sureties in a cause pending an appeal; or will be pleased by its mandate to direct or authorize the Circuit Court to proceed in the said matter in such manner as shall be consonant to the rights of your petitioners and of the libellant; your petitioners submitting themselves in all things to the order to be made in the premises.

And your petitioners shall ever pray, etc.

MORTON P. HENRY,
For Petitioners.

James A. Wright, one of the petitioners above-named, being duly affirmed according to law, deposeth and saith that the facts stated in the foregoing petition are true to the best of his knowledge, information and belief.

Affirmed and subscribed before me this 20th day of April, A. D. 1883.

James A Wright

John Rodgers
Notary Public

No. 3

114-35-5

BRIEF *SUR* PETITION.

The stipulators applied to the Circuit Court, having the control of the bond, or stipulation which was substituted for the ship, and on which the decree was entered against them by that court; for the relief, which a court exercising powers on equitable principles, can give to its sureties.

The principle of giving relief to stipulators, while retaining proper security for the enforcement of its orders, was carried into effect in the Circuit Court after appeal in the case of *ex parte* Perry, reported in 12 Otto, 183.

Before appeal in the case of the Lady Pike, reported in 6 Otto, 461.

Without the exercise of such powers, the Courts of Admiralty would be deprived of the best class of stipulators; as otherwise the effect of the lien will prevent persons of means, from becoming such sureties, if relief can not be given from liens pending the appeal.

The court below expressed itself willing to grant the relief, but by its order refuses to do so, on the ground of want of authority; as the appeal to the Supreme Court has removed the record; and their order refers the stipulators for the relief prayed to this court.

It is submitted, however, that certifying the record to the Supreme Court on appeal, does not carry up the fund: or the bond, which remains in the court below.

And that the power of protecting the *res*, and of giving relief—since the acts of Congress regulating appeals to the Supreme Court—remains in the Circuit Court after appeal.

Revised Statutes (701) requires the Supreme Court to send its mandate to the Circuit Court to execute a decree against stipulators.

Hence the fund remains in the Circuit Court.

The amendment to rule 8 (103 U. S. R.), promulgated May 2d, 1881, forbids the Circuit Court to send up with the record to this court, except as therein provided. Therefore the bond remains. And the act of Congress of 1875, Supplement to Revised Statutes, page 133, confining the questions on appeal to those of law, so that a new trial is not had *de novo* as in appeals prior to the act; perhaps modifies the effect of the appeal in admiralty, as stated in Heaton *vs.* The U. S., 5 Cranch, 281, and Wiscart *vs.* Dauchy, 3 Dallas, 321.

The application by virtue of the order in the cause is renewed in this court, and the same prayer is here made as in the court below.

If not granted by this court for the reasons above given, it is prayed that such directions may be given as will authorize the Circuit Court, notwithstanding the appeal, to give proper relief in the cause to the stipulators.

The stipulation was entered in accordance with the practice of Courts of Admiralty, releasing the vessel arrested on a stipulation being filed to secure the amount of the claim; not in double the amount under the act of 1847, per Story, J., in The Alligator, 1 Gallison, 145; approved in The Wanata, 5 Otto. 600–616; Benedict, S., 447, and Sec., 497.

MORTON P. HENRY,
For Petitioners.

NO. 280

114-33-5

SUPREME COURT OF THE UNITED STATES.

IN ADMIRALTY.

IN THE PETITION OF WILLIAM G. WARDEN, *ET AL.*, STIPULATORS FOR VALUE IN THE CASE OF

JENSEN

vs.

STEAMER BELGENLAND.

1. In a proceeding *in rem.*, the property arrested, may be delivered to the claimant, on his filing a stipulation for its agreed or appraised value. The stipulators thereupon take the place of the *res.*, and are a substitute therefor. If the decree of the court is for the libellant, judgment is entered against the stipulators.

The Alligator, 1 *Gallison*, 145.
The Wanata, 5 *Otto*, 600, 616.

This is done in accordance with the common law of the admiralty, and in accordance with express statute. *Section* 941, *of the Revised Statutes of the United States*, provides as follows: "Such bond or stipulation shall be returned to the court, and judgment thereon against *both* the principal and sureties, may be recovered *at the time* of rendering the decree in the original cause."

2. In accordance with both the common and the statutory law, and in exact conformity to the terms of the bail-

ment, summary judgment was awarded in the District Court against the claimant and his stipulators. From that judgment an appeal was taken to the Circuit Court, and on the cause being heard, a like judgment was registered in that court. An appeal was then taken to this court.

3. The effect of those judgments is, to create a lien upon the real estate of the claimant and his stipulators, precisely as would a judgment of a State Court of Pennsylvania.

Sec. 967, Revised Statutes of U. S.
Ward vs. *Chamberlain*, 2 *Black*, 430.
Cropsey vs. *Crandall*, 2 *Blatch.*, 341.
Benedict's Admiralty, *Sec.* 547.

4. Such lien ceases "in the same manner, and at like periods as judgments and decrees of the Courts" of Pennsylvania, cease, by law, to be liens on real estate or chattels real.

Sec. 967 R. S. of United States.
Myers vs. *Tyson*, 13 *Blatch.*, 242.

5. To grant the prayer of the petitioner, and thus deprive the libellant of a security vested in him by law, would be an act *coram non judice*. The Act of Congress (*supra*) prescribes the *duration* of the lien, and this court has no jurisdiction either to abridge the period or to set it aside.

6. That an appeal, instead of suspending the enforcement of the lien, which the judgment of the court and the Act of Congress has given the libellant, actually nullifies the judgment and all its inseparable incidents, is a proposition so extravagant that its mere statement is its refutation. The cases cited by the petitioner lend no countenance to such a doctrine, and are wholly inapplicable.

HENRY FLANDERS,
Proctor for Libellant.

Supreme Court of the United States.

IN ADMIRALTY.

IN THE PETITION OF WILLIAM G. WARDEN, *ET AL.*, STIPULATORS FOR VALUE IN THE CASE OF

JENSEN

vs.

STEAMER BELGENLAND.

HENRY FLANDERS,
Proctor for Libellant.

L56

Law Department.
Times Printing House,
725 & 727 Chestnut Street,
Philadelphia.

114-355

No. 169. *October Term, 1884.*

Supreme Court of the United States.

The Steamship Belgenland, Samuel Jackson, Master, and the Société Anonyme de Navigation Belge-Americaine, Claimants, Appellants,

vs.

Theodore Jensen, Master of the Norwegian Bark Luna, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief on behalf of the Appellants, with Finding of Facts and Opinion of the Circuit Court.

MORTON P. HENRY,
HENRY R. EDMUNDS,
For Appellants.

Allen, Lane & Scott's Printing House, 229-231 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

The Belgenland, Samuel Jackson, Master, and the Société Anonyme de Navigation Belge-Americaine, Claimants, Appellants,	October Term, 1884.
vs.	No. 169.
Theodore Jensen, Master of the Norwegian Bark "Luna," Appellee.	

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE APPELLANTS.

The following are the facts as found and the opinion as filed in the Circuit Court:—

The Bark "Luna"	In the Circuit Court Eastern District of Pennsylvania.
vs.	In Admiralty.
The Steamship "Belgenland."	Appeal from the Decree of the District Court.

McKENNAN, Cir. J.:

Finding of Facts.

1. Between one and two o'clock on the morning of September 3d, 1879, in mid ocean, a collision occurred between the Norwegian

bark "Luna," on her voyage from Humacao, in Porto Rico, to Queenstown or Falmouth, and the steamship "Belgenland," on a voyage from Antwerp to Philadelphia, which resulted in the sinking of the bark, in the total loss of the vessel and her cargo, and in the drowning of five of her crew.

2. The wind was between S. W. and W. S. W., and there was not much sea, but a heavy swell. The bark was running free, heading S. E. by E. half E., having the wind on her starboard quarter. All her square sails were set except her main royal, and she carried also her fore, main, and mizzen staysails and inner jib. Her yards were braced a little, her main sheet was down, but the weather clew was up. She was making about seven and one-half knots. Her watch on deck consisted of the first mate and three men; an able *seaman was on the lookout on the topgallant* forecastle, and a capable helmsman was at the wheel.

She carried a red light on her port side and a green light on her starboard side, properly set and burning brightly, which could be seen, on a dark night, and with a clear atmosphere, at least two miles. The character and location of these lights conformed to the regulations of the bark's nationality, which are the same as those of the British Board of Trade. About 1.45 o'clock the lookout sighted the white masthead light of a steamer right ahead, distant, as he thought, about one mile, and reported it at once to the mate, who cautioned the man at the wheel to "keep her steady and be very careful," and the bark held her course.

No side lights on the steamer were seen from the bark, but as the vessels approached each other' the white light of the steamer gradually drew a little on the port-bow of the bark *for three or four minutes.* The mate of the bark seeing the steamer's sails, and that she was heading directly for the bark, was close aboard of her, and reasonably apprehending that a collision was inevitable, ordered the bark's helm hard-a-port. In a few seconds the steamer's starboard light came into view, and in another instant she struck the bark on her port side, cutting her in two obliquely from the after part of her fore rigging to the fore part of the main rigging.

3. The "Belgenland" was steering N. W. by W. half W. by compass, and making about eleven knots. Her second officer had charge of the deck, and his watch was composed of ten able seamen, two quartermasters, the second boatswain, and the fourth officer. One able

seaman was stationed on the lee or starboard side of the bridge as a lookout. The second officer was on the bridge. The fourth officer was stationed at the after-or standard compass, which was near the mizzen-mast, but at the time was on the bridge, having come there to report a cast of the log. A quartermaster was at the wheel. The rest of the watch were underneath the turtle-back or topgallant forecastle.

The steamer was four hundred and sixteen feet long and about thirty-eight feet beam. The bridge was one hundred and fifty or one hundred and eighty feet from her bow, and was six or seven feet higher than the top of the turtle-back, which was about twenty-five feet above the water.

The steamer had her fore, main, and mizzen trysails, fore staysail and jib set and drawing, and probably her jigger also. She heeled to the starboard from ten to fifteen degrees.

4. The only lookout on the steamer was on the bridge. None was on the turtle-back, although it would have been entirely safe to station one there, for the alleged reason that the vessel was plunging into a head-sea, and taking so much water over her bows that he would have been of no use there.

5. The bark was not seen by those in charge of the steamer until just at the instant of the collision, when the second officer saw her head sails just across the steamer's bow, the lookout in the lee side of the bridge saw her after sails and stern.

6. The moon was up but was obscured by clouds. There was no fog, but occasional rain with mist, and the wind was blowing from the S. W. to W. S. W.

7. Objects could be seen at the distance of from five hundred yards to a mile. The masthead light of the steamer was sighted and at once reported by the lookout on the bark, at the distance of about a mile; the port light of the bark was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and reported to his roommates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion ladder, cross the deck, and reach the steamer's rail; after the collision, the mizzen-mast of the bark was all of her above water, and this was distinctly seen from the steamer when she was at the distance of five hundred yards from it.

8. The damages caused by the collision were assessed at $50,-248.23.

Opinion.

The following conclusions are fairly deducible from the evidence and the facts found:—

1. That the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision.

2. That the lookout on the bark saw the steamer when she was nearly a mile distant, and she was held steadily on her course, and that she thereby fulfilled her legal obligation. Even if her helm was ported, it was at a time and under circumstances which did not involve any culpability on her part.

3. That it was the duty of the steamer to keep out of the way of the bark, and, to that end, so to change her course as to preclude all danger of collision.

4. That the bark could and ought to have been seen by the steamer when they were sufficiently distant from each other to enable the steamer to give the bark enough sea room to avert any risk of collision. In this failure to observe the bark the steamer was negligent.

5. No satisfactory or sufficient reason is furnished by the respondent's evidence for this failure of observation. If it resulted from the inattention of the steamer's lookout, or because their vision was intercepted by her fore trysail, she was clearly culpable. If it is explicable by the condition of the atmosphere, no matter by what cause it was produced, *it was the steamer's duty to reduce her speed, and to place a lookout on her turtle-back.* An omission to observe these precautions was negligence.

But, considering the proof that the bark held her course, and that the steamer might have seen her by proper vigilance, when suitable precaution against collision might have been taken, a mere speculative explanation of the steamer's presumptive culpability cannot be accepted as sufficient.

I do not deem it necessary to enforce the conclusions by extended argument. The whole case is so clearly and satisfactorily treated by the learned judge of the District Court, that I adopt his opinion, and affirm the decree entered by him.

A decree will, therefore, be entered in this court against the respondent for $50,248.23, with interest from March 25th, 1881, and costs.

In a subsequent hearing the court overruled a plea to the jurisdiction on the ground that the collision was between foreign vessels of different nationalities occurring on the high seas, and not within the waters of the United States.

PRELIMINARY.

The opinion of the Circuit Court adopts that of the learned judge of the District Court, and affirms the decree entered by him; which opinion is also attached to the record.

Under the decisions of this court, the findings of fact by the Circuit judge only can be considered on the appeal, and cannot be supplied by other facts either in the opinion of the Circuit or of the District judge. The Annie Lindsley, 104 U. S. R., at pages 187, 188. (The Benefactor, 102 U. S. R., 214; The Sun Mutual Ins. *vs.* The Ocean Ins. Co., 107 U. S. R., 485.) As the proceedings in the Circuit Court are *de novo*, and are not confined to the evidence in the District Court; a mere affirmance of the decree of the court below would be a nullity. The Lucille, 19 Wallace, 73. While, therefore, the Circuit Court may coincide with the reasoning of the judge of the District Court as to rules of law, it is respectfully urged that no facts not specially found by the Circuit Court can be considered, and the decree must abide the result of such findings alone. The Sun Mutual Ins. Co. *vs.* The Ocean Ins. Co., *ante*.

On the facts so found, the conclusions of law are:—

1. That the change of course by the bark was made in the moment of peril, and, therefore, entailed no fault.

2. That the steamship was alone in fault in failing to see the bark in proper time to avoid the collision.

The ability to do so is inferred from the facts found with the further conclusion of law in the fifth paragraph: "5. No satisfactory or sufficient reason is furnished by the respondent for this failure of observation. If it resulted from the inattention of the steamer's lookout or because their vision was intercepted by her fore trysail she was clearly culpable. If it is explicable by the condition of the atmosphere, no matter by what cause it was produced, it was the

steamer's duty to reduce her speed and to place a lookout on her turtle-back. An omission to observe these precautions was negligence."

With regard to the possibility suggested that the fore trysail of the steamer may have hidden the side light of the steamer, it is sufficient to say that with the wind and course of the steamer as found, it was more than improbable; because the sail would not draw, if outside the steamer's rail so as to conceal the side light. But as no facts will be considered unless found; the suggestion which came from the other side, that it might have screened the side light, cannot be considered, unless the findings of fact make it such an indisputable conclusion as amounts to a presumption of law.

The Sun Mutual Insurance Co. *vs.* The Ocean Insurance Co., 107 U. S. R., 485.

The two opinions differ in a material question of fact, *i. e.*, the general course of the two vessels. See Record, page 11.

Both adopt a rule of presumption of fault in a steamer coming into collision with a sailing vessel, which is believed to be rejected by the authorities.

And treat a steamship in collision with a sailing vessel as presumptively in fault so as to *throw the burden of the exculpation* on the steamer, to absolve itself from blame instead of requiring libellant to show affirmatively the fault of the vessel sued.

And apply to a cause of collision, which is an action of trespass; the same presumptions which govern in actions against carriers who are treated as insurers, and therefore primarily liable, unless the carrier by proof bring himself within the exemptions of liability.

On this ground the opinion of the Circuit Court rejects as *speculative* "any explanation of the steamer's *presumptive* culpability," arising out of inability of either vessel to see the other's side lights until the moment of the collision; while the opinion of the District Court referred to, commences the discussion of the steamer's liability with the distinct assertion, "It was her duty "to keep out of the bark's way. About this there is no controversy "nor in my judgment room for controversy; the presumption is "therefore against her, the burden of proof is hers. *She must show a "sufficient excuse for a failure to keep off, or must answer for the loss.*" (Record, page 7.)

Record, p. 18.

An incorrect statement of a proposition of law will not affect the

judgment if the conclusions are right; yet it is believed that throughout the judgment appealed from, the vice of this erroneous principle of *presumptive fault* in the appellant's vessel affects the conclusions of the Court, and resulted in the decree on the facts reported. Negligence is not affirmatively found as a fact; the opinion substantially is, that the facts reported are not inconsistent with fault in the steamer, and the decree must be, therefore, against that vessel as *presumptively* in fault—in the same manner as in an action against a carrier for loss of cargo, who has failed to convince the Court that the damage was by a peril of the sea—while the law of collision is, that the loss will not be transferred from the vessel on which it lights to another, unless the evidence conclusively prove the vessel sued is alone to blame.

The rule is now believed to be that no presumptions arise from a collision between vessels, one of which is bound to give way to the other. The sailing rules are said to be guides for navigation, not rules of evidence, and the proof in cases of trespass is the same at sea as on land. A steamer colliding with a sailing vessel is no more necessarily in fault than a sailing vessel. The fault must arise from negligence proved, not from failure of exculpation by the steamer or the vessel which was bound to give way. The subject has lately been examined in two cases in which the authorities have been carefully scrutinized.

The L. P. Dayton, 18 Blatch., 411;
The Florence P. Hall, 14 Federal Rep., 416.

In both cases the question arose as to the presumption of fault, and in both cases it was held that no presumption exists in favor of either vessel in causes of collision. In The Florence P. Hall the language used is as follows:—

"It is a pure question of fact, to be determined on the evidence before any negligence can be legally attributed to either party, and the burden of proving it falls necessarily therefore on the libellant. * * * " In those cases where it has been held that the burden of proof was upon the steamer or the vessel sailing with the wind free to excuse herself for not keeping out of the way, either there was no question concerning proper lights and the clearness of the night, or else the *position of the sailing vessel was known*, and negligence was therefore a legal inference from other facts proved.

This principle is adopted, and without further discussion, in a late case, The Negaunee, 20 Fed. Rep. 918. "The libellant's case depends

upon maintaining the main allegation in his libel, to the effect that the collision was caused by the fault of the "Negaunee," and if he fails of his proof in that particular, he can not recover."

Wherever there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen. Per Swayne, J., in The Grace Girdler, 7 Wall. at page 403, citing The Catharine of Dover, 2 Haggard, 154, and is the rule adopted in the Privy Council in The City of London, Swabey R., 300, at page 302. And for this reason, in a case of "inscrutable fault," where fault exists, but on which side is not shown or does not clearly appear, the later rule is that the libel must be dismissed, because the vessel sued is not affirmatively shown to be in fault. Per Blatchford, J., in The Breeze, 6 Ben., 14. The Worthington & Davis, 19 Fed. Rep., at 839. And it is the rule of the English Admiralty, as appears in the decisions The City of London, *ante;* The Marpesia, L. R., 4 P. C. App., page 212; The Benmore, L. R., 4 A. & E., 132; The Maid of Auckland, 6 N. of C., 240.

The appellants contend that no *prima facie* case of fault is made out by the facts against the steamer, but that

II. The facts found show absence in fault on the part of the "Belgenland."

(*a*) *Lookout.* The substance of the facts found are these: The steamship carried a bright masthead light and side lights, the sailing vessel had only the usual side lights. The night was such, that although there was no fog around either vessel, the side lights of both vessels were shut out from each other.

The bark saw the masthead light of the steamer, a light of greater elevation and higher power than the side lights, ahead and a mile off, but failed to see the side light of the steamer until the former had ported her helm when the steamer was close aboard, and the collision appeared inevitable. "In a few seconds the steamer's starboard light came into view, and in another instant she struck the bark on her port side, cutting her in two obliquely." (Record, page 16.)

The measure of distance and time at which a side light could be seen on the night of the collision, with the exercise of all proper vigilance, is therefore ascertained with certainty, as the facts find that the bark had a lookout man stationed on the

fore topgallant forecastle (Record, page 16), and from the time the masthead light of the steamer came in sight the attention of the bark's watch was directed to a steamer being in the vicinity; and the duty of discovering its side light, to make out its course, increased the attention of the bark's lookout; yet under these circumstances the side light of the steamer was never seen, with all the aroused vigilance of the lookout and of the officers of the bark, until the vessels were close together, and until after the bark had commenced to cross the steamer's bow under an order justified only by apprehension of a collision after the steamer's sails came in sight. The sails of the bark were seen from the steamship about the same time just as she was crossing the bow of the latter vessel. (Record, page 17.)

The difference in time of sighting each other is therefore almost inappreciable, although the bark had knowledge of the approach of the steamship, and the latter had none of the approach of the bark.

Under such circumstances there is no *prima facie* conclusion of negligence in the steamer's lookout deducible from the facts reported; but on the contrary, the fact that each vessel discovered the other at about the same time, is decided by this court to be conclusive proof of proper vigilance on the part of the steamer's lookout, and that the collision was not caused by any neglect of lookout on the part of either vessel.

This rule seems so clear as not to require authority to support it. It has been enforced as a rule of evidence in this court in two cases in which liability was sought to be enforced for failure of lookout.

In Steinbach vs. Rae, 14 Howard, 538, Mr. Justice Nelson, a Judge of great experience in maritime causes, held that the fact that each vessel discovered the other at about the same time, should be regarded as *conclusive* against the charge of negligence in the respective lookouts in a cause of collision, and the vessel bound to avoid the other was held blameless as the failure to see each other was the result of unavoidable accident.

In The Annie Lindsay, 104 U. S. R., 191, the fact that the lookout of each vessel failed to see the lights of the other was held to show that it was not the want of proper vigilance, but that the state of the weather, or some other obstacle, prevented them from being seen at the usual distance.

The simultaneous sighting of the two vessels from each other also shows that the station of the lookout on the bridge

of the steamer, instead of on the turtle back forward, had no result in producing the collision, since the lookout on the forecastle of the bark saw no better than the steamer's lookout on the bridge of that vessel. The collision is not, therefore, attributable to the want of a lookout stationed forward on the steamer. Although the position of a lookout forward is required at proper times, a vessel has never yet been condemned for want of a lookout at that point where his absence did not contribute to the accident.

In The Morning Light, 2 Wallace, 550, at page 558, the position of a lookout of a vessel claimed to be in fault was criticized as not being farther forward; but as the actual stations were equally good for the purpose of observation, no blame was imputed.

In The Fannie, 11 Wallace, page 243, the Court refused to discuss the question whether the lookout of the schooner was sufficient. "If it was not, it can make no difference."

And in The Farragut, 10 Wallace, 334, the Court says: "But it would be against all reason to contend that the master or owners of a vessel should be made liable for the consequences of an accident by reason of not having a special lookout where the collision or loss could not have been guarded by a lookout, or it is clear that the absence of a lookout had nothing to do in causing it."

The reason of requiring a lookout to be stationed forward, arises from his ability to see objects low down on the water better from that point than elsewhere. Haney *vs.* The Baltimore Steam Packet Co., 23 How., 293. But when a steamer is heading a fresh breeze with a heavy swell of the sea, the stationing of a lookout at the bow becomes useless, in consequence of the spray flying in his face from the stem of the steamer. Such effect would be produced on such a mass as a large steamer to some extent, independently of her rate of speed, although high speed would increase it. The end of a pier running out into the ocean with a fresh breeze blowing and swell rolling against it, would not be the best place for observation, and for this reason when the spray is flying at the bow, a steamer's lookouts are then stationed on the bridge, where they can see better under such circumstances; and where protections in the shape of canvas screens are placed in order to prevent the lookout from being distracted from his duty by flying spray reaching to that point. The bridge was only six or seven feet higher than the turtle-back.

(*b*) *Speed of the steamer.* The findings of fact do not say that the speed of eleven miles an hour was in itself excessive at that time

and place. All questions of speed are relative. In the absence of fog, full speed has never been condemned except in harbors and crowded thoroughfares. On the ocean it is allowable, The Morning Light, 2 Wallace, at 558, *except where reasons known* to exist, require its reduction. There is no more risk involved in that rate of speed for a steamer which has a power of arresting its motion by the reverse movement of its engine than the speed of seven miles in a sailing vessel like the bark which has none. The Rhode Island, 17 Fed. Rep., 554. It is difficult to condemn the steamer for excessive speed without also condemning the sailing vessel.

The conclusion of the Court only finds the speed of the steamer was excessive, if the condition of the atmosphere was such as led to the failure to see the bark's lights.

The following are the words in the fifth paragraph of the opinion: "If it (the failure of observation) is explicable by the condition of the atmosphere, *no matter by what cause it was produced*, it was the steamer's duty to reduce her speed and to place a lookout on her turtle back. An omission to observe these precautions was negligence."

Negligence in speed is not found as a fact, but is treated as a conclusion of law, if the state of the atmosphere prevented the steamer from seeing the side lights of the bark.

If such a state of the atmosphere was known to exist, by those on board of the steamship the conclusion of fault might be justified; but knowledge is not found or imputed to the crew of the steamer.

In the absence of fog around a vessel a partial mist, elsewhere on the surface of the ocean, will render side lights invisible at night to another vessel; but the existence of such a state of the atmosphere is not one of those contingencies which the steamer is bound to foresee or provide against. Such cases come within the law of inevitable accident.

Inevitable accident is not to be confounded with *vis major* and is described as a "relative term," to be construed not absolutely but reasonably with regard to the circumstances of each case. The Morning Light, 2 Wallace, at 560. Dr. Lushington in The Europa, 14 Jurist, 629, S. C., 2 E. L. & E. R., 559, shows that in one sense few accidents are unavoidable or come within the meaning of the word "inevitable" except those which are occasioned by *vis major* or the act of God, and his definition is that which is adopted by this court in The Morning Light, *ante*.

The law of prudent navigation is thus stated in The Grace Gird-

ler, 7 Wallace, 196: "The law of navigation does not require the highest degree of caution that can be used. It is enough that it is reasonable under the circumstances, such as is usual in similar cases and has been found by long experience to be sufficient." See also, The Java, 14 Wall., 189.

Undoubtedly it would be safer if all vessels reduced speed at night, or even lay to, but this has never been required. The greater convenience of mankind overrides the individual risk, and permits such speed as a means of usefulness in commerce. In The Morning Light, 2 Wallace, page 550, Mr. Justice Clifford refers to the numerous reported cases where it has been held that collisions occurring in consequence of the darkness of the night and without fault on the part of either party are to be regarded as inevitable accidents. In the case of Peck vs. Sanderson, 17 Howard, 178, a steamer met a sailing vessel on a starlight night, there being a slight haze on the water, and failed to discover her; the steamer was held not to be in fault. The fact that there was a haze on the water from a south-west wind did not require her to reduce her speed, even close on the American coast.

In cases of fog the necessity for a reduction of speed is apparent, and steamers and sailing vessels also are condemned for going at a high rate of speed in fogs, because the danger is known to exist. The same rule of the road would apply to vessels sailing at full speed, where there are partial mists or fogs which would render vessels invisible to each other; but this fact must or should be known to those on whom the duty is cast to render them responsible. In the daytime such a partial haze or fog intervening between vessels, although not enveloping them, must be known; but it cannot be discovered at night, except in the case of an approaching steamship; the bright masthead light of which, when seen without its side lights showing, gives to another vessel the knowledge which those on board the bark had, and those on the steamer had not, that a partial and low-lying mist lay between the two vessels.

The Milanese, 43 L. T. R., N. S., page 151.

It is only in respect to the possible existence of some such a state of the atmosphere that the Court finds the rate of speed of the steamer excessive. The proposition in the form that wherever the flying spray from a head wind and sea prevents the stationing of a lookout on the forward part of a steamer the speed must be reduced, is believed not to be maintainable, and it is inconsistent with the availability of the use of steam for ocean transportation.

The great advantage of steam power over sail is that it renders the vessel independent of the force and direction of the wind, and enables her to contend with head winds in a direct course. A rule that a vessel contending with such a head wind and sea must reduce her speed to such an extent as will enable a lookout to be stationed forward is believed to be impossible in the vicissitudes of ocean weather; take the instance of a steamer coming to the westward in the teeth of strong westerly gales, which could not do it. With whatever insistance Courts require vessels to maintain a lookout man stationed forward, the requirement only is, that such a lookout shall be maintained, when it is reasonably possible or consistent with the prosecution of the voyage to do so; and the alternative of reducing the speed because a lookout cannot be stationed *forward*, is not required except perhaps in crowded thoroughfares, because it is not consistent with the use of steam-power in navigation.

It is impossible to speak of any given rate of speed to a vessel as in itself being proper or improper; everything depends upon the circumstances under which it is maintained. The eleven knots of the steamer on this night is below what is often maintained by a sailing ship. Safety in long voyages is only consistent with maintaining a proper speed both by day and night in reference to the vessel's capacity for fuel and provisions. It appears unreasonable to deny the use of its full power on the open seas to a steamer when the station of a look-out forward is impracticable. It certainly is not consistent to deny it to a steamer without denying also the right to maintain full speed to a sailing vessel under similar circumstances, as the duty of the latter to keep a vigilant lookout, and under some circumstances to give way to another vessel, is as imperative as that of steamers. The importance of this rule of navigation, as stated in the opinion, would seem to call for more than an assertion of its existence without showing the necessity for its adoption. Although, as it appears, the position of a steamer's lookout on this occasion did not contribute to the collision, the discussion might be avoided under the cases cited.

III. But the libellant's bark was in fault.

This reasoning, however, will not apply to the bark; those on board that vessel knew that their side lights were invisible to the steamer, because those of the steamer were invisible to them. They

knew also that the steamer had not the knowledge of the vicinity of the bark, because the bark carried no masthead light.

The appearance of the steamer's masthead light alone was notice to them of the necessity of giving some warning by rocket, foghorn, or flare-up light of the approach of the two vessels, and no attempt was made to notify the steamer. The Milanese, 43 Law Times, N. S., page 107, a case which will be presently referred to. This necessity created the statute which makes the exhibition of a torch light obligatory on American vessels, to steamers approaching at night. Under these circumstances the Courts of this nation to which the owners of the Norwegian bark have applied for redress, recognize as a rule of reasonable precaution for safety at sea, that some action should be taken by the sailing vessel to notify an approaching steamer.*

The statutes of this nation enforce by fine and penalty on their own vessels the precaution which safety requires. But the American statute did not create a new and an artificial rule like some adopted by common consent, which requires one or another of the vessels to give way or hold its course; but it enforces a precaution which experience has shown to be requisite to avoid collision at night.

The fine imposed by the American statute is not enforceable upon foreign vessels; but although its penalties cannot be enforced against them, yet a foreigner who seeks redress in the Courts of the United States submits that his conduct and that of the party impleaded shall be construed by those rules which that forum applies to the case.

The Scotland, 105 U. S. R., 124.

And on this point the language of Lord Chelmsford in The Amalia, Br. & Lush., 151, is pertinent: "It may be asked what breach of international law or interference with the natural rights of foreigners is produced by the legislature saying that all suitors having recourse to our courts to obtain damages for an injury from a

* Section 4234. Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights, and every such vessel shall, on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching. Every such vessel that shall be navigated without complying with the provisions of this and the preceding section, shall be liable to a penalty of $200, one-half to go to the informer; for which sum, the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel, in any District Court of the United States having jurisdiction of the offense.

person not himself actually in fault shall recover only according to the limitations of a British statute."

If the libellant was the owner of an American vessel he could not have recovered in full without showing that his failure to show a torch to an approaching steamer at night had not contributed to the collision. This is this rule of every Circuit in the United States.

The Narragansett, 11 Fed. Rep., 918.
The Eleanora, 17 Blatch., 88;
The Roman, 14 Fed. Rep., 63.

The language of the opinion in the latter case, in which Mr. Justice Bradley sat with the Circuit Judge, is as follows: "If the schooner had performed its duty by exhibiting the prescribed light presumably it would have escaped injury. The burden is upon it to show that the cause was a misconduct or negligence of somebody else, and must be borne out by no uncertain proof or doubtful conclusions." In another case, The Golden Grove, 13 Fed. Rep., 700, the observance of the rule of showing a torch at sea was enforced as to an American sailing vessel, whether "she obeyed an imperative requirement of the law of her country or merely conformed to a regulation prescribed by such law as useful and necessary for the protection of life and property at sea."

The statutes making it obligatory on vessels to observe certain rules are said in The Rhode Island, 17 Fed. Rep., at page 558, "not to be an arbitrary enactment but a statutory recognition of the universal rule." And as early as in a case decided in England, 1860, The Saxonia, Lushington's Rep., page 410, it will be found that a flare-up light was exhibited by an English sailing vessel to a Hamburg steamer at night meeting her head on; so that the American statute did not introduce a novelty, but enforced by penalty on the vessels of that nation a rule of general application at sea. Independently therefore of any statute, wherever it appears that a sailing vessel is being approached by a steamer at night under circumstances which render the side lights of that vessel invisible to the other, the duty of that vessel is to resort to some of the many expedients known to seamen to notify the approaching vessel of its vicinity, whether by exhibiting flare-up lights, sending up a rocket, or blowing a horn.

A case in the Court of Appeals, "The Milanese" enforces this duty on sailing vessels approaching a steamer at night under circumstances almost entirely similar to this. The sailing vessel saw the masthead light of a steamer at night, but failed to make out

any side light. The sailing vessel was held to be in fault because she made no signals to the approaching steamer; the fact that the sailing vessel could not see the side lights when the masthead light was in sight, was held to be an indication that a steamer was approaching whose side lights were obscured by fog, and that the same circumstances which obscured the steamer's side lights rendered those of the sailing vessel invisible to her.

The court below had found the atmosphere was not such as to necessitate and render imperative the sounding of a fog-horn by the "Bokhara."

Per James, L. J.: "The 'Bokhara' moreover admits that she did see a white light, and I do not believe she at any time saw the red or green light of the 'Milanese.' That should have indicated to her the presence of a fog-bank or something of the sort hanging low down in the water, and she ought to have used a fog-horn to indicate her position to vessels in it, and from whose sight her side lights would be obscured by it." Brett, L. J.: "She must have known, therefore, that her side lights were not visible to vessels in it, and it was therefore her duty to apprise them of her presence by blowing a fog-horn, even if she was not herself actually in the fog."

The Milanese, 43 L. T. R., N. S., 107, affirmed in the House of Lords, 45 L. T. R., N. S., page 151. S. C. reported in 4 Asp. M. C., 438.

In the case of The Oder, reported in 13 Fed. Rep., 172, a North German steamship was absolved in a collision with a sailing vessel at night, because the latter failed to signalize a steamer which it knew was approaching her in a manner that the side lights of the sailing vessel could not be seen by the steamer.

These cases were not decided upon duties imposed by statutory sailing rules. They recognized the duty of signalizing steamers at night whenever the necessity for doing so exists.

The case does not therefore involve any question of the application of the municipal law of the United States to vessels of other nationalities.

There is no universal maritime law binding everywhere upon vessels of every nationality using the pathway of the sea.

The maritime law of each nation is its own system, which it enforces on those who seek redress in its forum. The maritime law of the United States, under which redress is sought by the owners of the "Luna," holds that vessel in fault because

it failed to notify its presence to an approaching steamer at night. It does not attempt to enforce the penalties for the breach of its statute on a vessel of another nation, but it will refuse redress to those of every nationality who violate a rule which the American law believes to be so essential; that it enforces it by fine and penalty as a necessary precaution to preserve life and property at sea; in the same manner that it gives the benefits of its law to the citizen and foreigner alike, even in controversies between citizens and foreigners the laws of whose nationality gives no similar right in similar causes to foreign suitors in their courts. The Scotland, 105 U. S. R., 24. If the Norwegian owner of the libellant's vessel could recover in the American Courts damages for a collision under circumstances in which a citizen of that country would be adjudged in fault, it would constitute a judicial anomaly.

No rule of comity requires the Courts of this country to give redress to a foreigner in a case where it would refuse redress to its own citizen, even if it should find that the law of the flag of the libellant's vessel adopted a different view of the law of negligence at sea from those of the Courts of the United States, and there is no reason to believe that the Courts of Norway or of Belgium would decide otherwise in such a case than the Courts of the United States.

In conclusion the appellant's counsel contend

I. That the decree was erroneous in the facts found.

1. Because it did not give due weight to the circumstance that, as neither vessel saw the side lights of the other until the moment of collision, the allegation of want of proper observation by steamer's lookout is absolutely disproved by the facts found.

2. Because the libellant's vessel failed in the duty of signaling its presence to an approaching steamer at night, after seeing the masthead light and failing to see her side light. The collision was, therefore, attributable to the negligence of the sailing vessel alone, inasmuch as the same cause which shut out the steamer's side lights rendered those of the sailing vessel invisible to the steamer.

MORTON P. HENRY,
HENRY R. EDMUNDS,
For Appellant.

114-355

In the Supreme Court of the United States.

The Steamship "Belgenland," Samuel Jackson, Master, and The Société Anonyme de Navigation Belge-Américaine, Claimants, Appellants, vs. *Theodore Jensen, Master of the Norwegian Bark "Luna."*	October Term, 1884. No. 169.

SUPPLEMENT TO APPELLANTS' BRIEF.

The counsel for the libellant ask leave to file a supplement to their brief, containing, in accordance with the rule of this court, a Statement of the case, and Assignments of error in law on the finding of facts.

Statement of the Case.

This was a cause of collision, instituted by Theodore Jensen, master of the Norwegian bark "Luna," on behalf of the owners of the cargo, against the Belgian steamship "Belgenland," in which Samuel Jackson, master, appeared as claimant on behalf of "The Société Anonyme de Navigation Belge-Américaine."

At the time of answering, an exception to the jurisdiction was filed:

Because the alleged collision occurred on the high seas and not within the jurisdiction of the United States, and was between foreign vessels, and that the bark "Luna" was a foreign vessel, and that no American citizen is interested in the bark or cargo.

The decree in the District Court was in favor of libellants, and was affirmed on appeal in the Circuit Court, the latter court overruling the plea to the jurisdiction. See Record, page 20.

THE ERRORS OF LAW IN THE RULING OF THE CIRCUIT COURT ARE ASSIGNED AS FOLLOWS:—

(1.) In overruling the plea to the jurisdiction.

(2.) In not ruling that as each of the vessels discovered the other's side lights at the same time, the bark having no mast-head light, and its lookout being found to be properly stationed and careful; the collision is shown not to have been caused by want of proper observation on the part of the steamer.

(3.) The facts finding that libellant's vessel discovered the head-light of the steamer at night, at a distance of a mile, and was unable to see her side lights, the ruling was incorrect in not holding the bark to be in fault by reason of its failure to signal its vicinity to the approaching steamer at night.

(4.) That the facts finding that the starboard side light of the steamer was seen from the bark, after the bark's course was changed, under a port helm, and when the bark was nearly under the bows of the steamer; the side light of the steamer could never have been screened by its fore trysail, and the suggestion in the opinion of the court that it might have been, is disproved by its findings of facts.

(5.) That the court erred in not ruling that a foreigner seeking redress for collision in the courts of the United States, subjects his cause to be adjudicated by the law of the United States, and that by the law of the United States as administered in its admiralty courts, a sailing vessel which fails to signalize an approaching steamer at night, is in fault; and renders the sailing vessel liable, unless it is shown that the absence of the precaution would not have prevented the collision.

(6.) That the court erred in applying its conclusions of law to the findings of facts; in treating a steamer as presumptively in fault for a collision with a sailing vessel at night; while by the maritime laws of the United States no liability can be pronounced unless negligence is proved or is a necessary presumption from the findings of facts.

In support of the plea to the jurisdiction it is respectfully presented:—

That while all causes of collision are *communis juris*, and the admiralty courts can take jurisdiction in suits between foreign vessels it is always discretionary.

Courts are reluctant to interfere in questions between foreigners; and where the objection is raised in the outset unless there is a reason of public convenience and to save a failure of justice; a court is not bound to interfere in a question which concerns only foreigners, and which the tribunals of Norway or of Belgium were equally competent to deal with.

In The Blaireau, 2 Cranch, 240, Ch. J. Marshall states these views.

The propinquity of Norway to Belgium is such that there could be no reason to fear a failure of justice by remitting the cause to the courts of Belgium, and a *protest* made at the outset of the cause prevents a question of jurisdiction being used for purposes of delay. The most substantial reason which can

be given for sustaining this plea to the jurisdiction is that when the admiralty courts of the United States enforce process *in rem*, by a sale of a foreign vessel, the purchaser cannot obtain an American registry under a judicial sale by the courts of the United States. So that there is reason in all cases to fear a sacrifice by enforcing a judicial sale, especially in the case of vessels as valuable as the "Belgenland."

These suggestions are respectfully presented.

MORTON P. HENRY,
HENRY R. EDMUNDS,
For Appellants.

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114-355

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 169.

THE STEAMSHIP "BELGENLAND," &c.,

Appellants,

vs.

THEODORE JENSEN, &c.,

Respondents.

BRIEF FOR RESPONDENT.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States.

THE STEAMSHIP BELGENLAND, ETC.,
Appellants,

AGAINST

THEODORE JENSEN, Master, &c.,
Respondent.

No. 169.
October Term,
1884.

Respondent's Brief.

This is a cause of collision, civil and maritime. The libel was filed September 16, 1879, in the District Court of the United States for the Eastern District of Pennsylvania (Record, p. 1) by the master of the injured vessel, on behalf of her owners, the owners of her cargo, and her crew. A claim was filed by the master of the steamship, September 19, 1879 (Record, p. 3).

On October 13, 1879, the claimant answered the libel (Record, p. 4), and at the same time filed a plea to the jurisdiction of the Court (Record, p. 6). The cause was subsequently tried, and a decree in favor of the libellant was entered on the 14th February, 1881 (Record, p. 14). From this decree the claimant appealed to the Circuit Court. The appeal was argued June 27th, 1881 (Record, p. 15), and on the 14th October following a decree was entered in favor of the libellant (Record, p. 18). On the 19th October, 1881, the

claimant moved for a reargument on the plea to the jurisdiction which was had (Record, pp. 19, 20); the said plea was overruled and the decree already made ordered to stand.

On the 22d October, 1881, the claimant appealed to this Court.

The Circuit Court made and filed (Record, p. 16) the following

FINDINGS OF FACT.

I. Between one and two o'clock on the morning of September 3, 1879, in mid-ocean, a collision occurred between the Norwegian bark *Luna*, on her voyage from Humacao, in Porto Rico, to Queenstown or Falmouth, and the steamship *Belgenland*, on a voyage from Antwerp to Philadelphia, which resulted in the the sinking of the bark, in the total loss of the vessel and her cargo, and in the drowning of five of her crew.

II. The wind was between S. W. and W. S. W., and there was not much sea, but a heavy swell. The bark was running free, heading S. E. by E. half E., having the wind on her starboard quarter. All her square sails were set except her main royal, and she carried also her fore, main and mizzen stay sails and inner jib. Her yards were braced a little, her main sheet was down, but the weather clew was up. She was making about seven and one-half knots. Her watch on deck consisted of the first mate and three men; an able seaman was on the lookout on the topgallant forecastle, and a capable helmsman was at the wheel.

She carried a red light on her port side and a green light on her starboard side, properly set and burning brightly, which could be seen on a dark night and with a clear atmosphere, at least two miles. The character and location of these lights conformed to the regula-

tions of the bark's nationality, which are same as those of the British Board of Trade. About 1.45 o'clock the lookout sighted the white masthead light of a steamer right ahead, distant, as he thought, about a mile, and reported it at once to the mate, who cautioned the man at the wheel to "keep her steady and be very careful," and the bark held her course.

No side lights on the steamer were seen from the bark, but, as the vessels approached each other, the white light of the steamer gradually drew a little on the port bow of the bark for three or four minutes. The mate of the bark seeing the steamer's sails, and that she was heading directly for the bark, was close aboard of her, and reasonably apprehending that a collision was inevitable, ordered the bark's helm hard a-port. In a few seconds the steamer's starboard light came into view, and in another instant she struck the bark on her port side, cutting her in two obliquely, from the after part of her fore rigging to the fore part of the main rigging.

III. The *Belgenland* was steering N. W. by W. half W. by compass, and making about eleven knots. Her second officer had charge of the deck, and his watch was composed of ten able seamen, two quartermasters, the second boatswain and the fourth officer. One able seaman was stationed on the lee or starboard side of the bridge as a lookout. The second officer was on the bridge. The fourth officer was stationed at the after or standard compass, which was near the mizzen-mast, but at the time was on the bridge, having come there to report a cast of the log. A quartermaster was at the wheel. The rest of the watch were underneath the turtle-back or top-gallant forecastle.

The steamer was four hundred and sixteen feet long and about thirty-eight feet beam. The bridge was one hundred and fifty or one hundred and eighty feet from her bow and was six or seven feet higher than the top

of the turtle-back, which was about twenty-five feet above the water.

The steamer had her fore-main and mizzen-try-sails, fore-stay-sail and jib set and drawing, and probably her jigger also. She heeled to starboard from ten to fifteen degrees.

IV. The only lookout on the steamer was on the bridge. None was on the turtle-back, although it would have been entirely safe to station one there, for the alleged reason that the vessel was plunging into a head sea and taking so much water over her bows that he would have been of no use there.

V. The bark was not seen by those in charge of the steamer until just at the instant of the collision, when the second officer saw her head-sails just across the steamer's bow; the lookout on the lee side of the bridge saw her after-sails and stern.

VI. The moon was up, but was obscured by clouds. There was no fog, but occasional rain with mist, and the wind was blowing from the S. W. to W. S. W.

VII. Objects could be seen at the distance of from five hundred yards to a mile. The mast head-light of the steamer was sighted and at once reported by the lookout on the bark at the distance of about a mile. The port-light of the bark was seen by a steerage passenger on the steamer, looking out of his room just under the bridge, and reported to his room-mates long enough before the collision to enable the second steerage steward, who heard the report, to go up the companion ladder, cross the deck and reach the steamer's rail. After the collision the mizzen-mast of the barque was all of her above water, and this was distinctly seen from the steamer when she was at the distance of five hundred yards from it.

VIII. The damages caused by the collision were assessed at $50,248.23.

IX. The collision in question occurred between the *Luna*, a Norwegian bark, and the steamship *Belgenland*,

which steamship was owned by a Société Anonyme de Navigation Belge-Américaine, a Belgian corporation or association created by the laws of the Kingdom of Belgium, and that the said steamship was a Belgian vessel in point of nationality, sailing under the Belgian flag; and that the collision occurred on the high seas and not within the waters of the United States.

And filed also the following:

OPINION.

The following conclusions are fairly deducible from the evidence and the facts found:

I. That the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision.

II. That the lookout on the bark saw the steamer when she was nearly a mile distant, and she was held steadily on her course, and that she thereby fulfilled her legal obligation. Even if her helm was ported, it was at a time and under circumstances which did not involve any culpability on her part.

III. That it was the duty of the steamer to keep out of the way of the bark, and, to that end, so to change her course as to preclude all danger of collision.

IV. That the bark could and ought to have been seen by the steamer when they were sufficiently distant from each other to enable the steamer to give the bark enough sea room to avert any risk of collision. In this failure to observe the bark the steamer was negligent.

V. No satisfactory or sufficient reason is furnished by the respondent's evidence for this failure of observation. If it resulted from the inattention of the steamer's lookout, or because their vision was intercepted by her fore try-sail, she was clearly culpable. If it is explica-

ble by the condition of the atmosphere, no matter by what cause it was produced, it was the steamer's duty to reduce her speed and to place a lookout on her turtleback. An omission to observe these precautions was negligence.

But, considering the proof that the bark held her course, and that the steamer might have seen her by proper vigilance, when suitable precaution against collision might have been taken, a mere speculative explanation of the steamer's presumptive culpability cannot be accepted as sufficient.

I do not deem it necessary to enforce these conclusions by extended argument. The whole case is so clearly and satisfactorily treated by the learned Judge of the District Court, that I adopt his opinion and affirm the decree entered by him.

A decree will, therefore, be entered in this Court against the respondent for $50,248.23 with interest from March 25th, 1881, and costs.

THE LAW.

I. The question of jurisdiction is well settled. At the most it is discretionary with the Courts of the United States to take jurisdiction of admiralty causes between foreigners. The Courts below having properly exercised their discretion, this Court will not interfere and reverse their action.

The *Maggie Hammond*, 9 Wall., 435.
Taylor vs. Carryl, 20 How., 611 (dissenting opinion by TANEY, C. J.).

II. Under the circumstances the fact of a collision is evidence of great negligence somewhere. The presumption is against the steamer.

The New Orleans, 8 Ben., 102.
The Lizzie Major, *Id.*, 333.
The Cella, 3 Ben., 168.

III. If the night was thick her speed of eleven knots against wind and sea was too great. If it was clear enough to see a vessel a quarter of a mile, irrespective of lights, the steamer failed to see the bark as soon as she should have seen her, for want of a proper look-out. In either case there was negligence on the part of the steamer.

The Java, 6 Ben., 245.
The Hansa, 5 Ben., 502.
The Colorado, 1 O to, 692.

IV. The steamer's lookouts were insufficient. Ocean steamships should have two besides the officer of the deck.

Chamberlain vs. Ward, 21 How., 570.

V. Those she had were improperly stationed. The bridge, one hundred and eighty feet from the bow, was no place for a lookout, especially when the head sails were set. If, for any reason, a lookout could not have been stationed on the turtle back, one should have been on the fore-yard.

VI. The lookout on the steamer, if properly stationed, was not attentive to his duty. A vessel without a light could have been seen at least a quarter of a mile. The bark was not seen by those in charge until the instant of the collision. This is conclusive of negligence.

The Ariadne, 13 Wall., 475.

VII. There was no negligence on the part of the bark. Her crew were vigilant and alert. She saw the steamer seasonably and held her course, as in duty bound. Had the law required any action on her part on sighting a steamer, she could have done no otherwise. The steamer's side lights were not visible, the bark was not apprised of her course, and, therefore,

any change of course on the part of the bark would have been wrong.

The Rona and The Ava, 2 Asp. Mar. L. C., 182, 29 L. T. N. S., 781.
The James Watt, 2 W. Rob., 270.
The Moderation, 1 Mar. Law Cas., O. S., 413, 9 L. T. N. S., 586.
The Bougainville, L. R. 5 P. C., 316–21.
The Great Eastern, 2 Mar. Law Cas., O. S., 97, 11 L. T. N. S., 5.

VIII. The final porting of the bark's helm, *in extremis*, as it were, was no negligence, if wrong. The steamer had no business to approach her so closely.

The Carroll, 8 Wall., 302.

Rules of navigation do not apply to a vessel required to keep her course after the approach so near that the collision is inevitable.

The Wenona, 19 Wall., 41.
The Nicholls, 7 Wall., 656.
The Johnson, 9 Wall., 146.
The Dexter, 23 Wall., 69.

That manœuvre, however, was right. The mate of the bark knew that if the steamer discovered him at all she would port her helm. He knew that hard-a-port was the instant, invariable order on steamers on the sudden report of a light ahead, and under the circumstances of this case was the right order to give, as the vessels were meeting nearly end on. The result proved he was right.

IX. The only explanation which reconciles all the testimony is this: The two vessels were not on precisely opposite courses; a variation of a few degrees in the compass of either would account for this. Probably the steamer's heel of 12° to starboard produced a sufficient variation in her compasses, as she is an iron ship. The courses were probably slightly intersecting. The bark having the wind free was necessarily yawing.

When the steamer's light was first sighted the bark had fallen off; as she luffed gradually to her course the steamer's light was brought "a little on the port bow." The port light of the steamer was not visible to the bark, as their courses were intersecting, and not precisely opposite. The green light of the steamer was masked by her fore try-sail, which at the same time screened the barque from the observation of the steamer's lookout. The steerage passenger, looking forward from the port-hole of his stateroom, almost directly under the lookout, and some twenty feet below him, saw the bark and her red light, because he was underneath the try-sail.

It follows that the steamship's side lights were not properly placed, and that her lookout was not properly stationed. Both should have been forward of the try-sail.

X. The judgment of the Circuit Court must be affirmed.

HENRY FLANDERS,
J. LANGDON WARD,
Of Counsel for Libelant.

114-35-5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

NO. 169.

THE STEAMSHIP "BELGENLAND," &c.,

Appellants,

vs.

THEODORE JENSEN, &c.,

Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre Street, New York.

Supreme Court of the United States.

THE STEAMSHIP "BELGENLAND," &c.,
Appellants,

AGAINST

THEODORE JENSEN, &c.,
Appellee.

No. 169.
October Term,
1884.

Supplemental Brief for Appellee.

As to paragraph I. of the opinion:

The facts specially found on this subject are

1. The bark was heading S. E. by E. ½ E.
2. The steamer was steering N. W. by W. ½ W.
3. When first sighted from the bark the steamer was right ahead.
4. The bark held her course until the instant of collision.
5. There was a collision.

These facts so found are, to use the words of the Chief Justice in the U. S. vs. Pugh (99 U. S., 265), "in the absence of anything to the contrary, the legal equivalent of a direct finding" "that the vessels were approaching each other from opposite directions, upon lines so close to each other as to involve the necessity of a deflection by one or the other of them to avoid a collision."

As to paragraph II. of the opinion:

The *facts* stated here are *found* specially. That

the bark thereby fulfilled her legal obligation, and that the porting of her helm *in extremis* was not culpable, are necessary and legitimate conclusions of law from the facts.

As to paragraph III. of the opinion:

This is a mere statement of Statute law, amply fortified by decisions innumerable.

As to paragraph IV. of the opinion:

This is a necessary conclusion from, or rather, the VI. and VII. findings of fact are the legal equivalent of the conclusions of fact stated in this paragraph. The law is settled. (The *Benefactor*, 102 U. S., 217).

As to the facts to be considered:

The appellants, we think, misapprehend the law as laid down by this Court, when they claim "that no facts not specially found by the Circuit Court can be considered."

This Court, speaking by the mouth of Mr. Justice Matthews, said, in the case cited by the appellants, distinguishing admiralty appeals from cases arising on special verdict, "for our jurisdiction in cases of this description extending to a determination of the questions of law *arising upon the record*, may be predicated of facts which appear in any part of it, whether admitted by the parties in the pleadings, *or* by stipulation, *or* found by the Court."

As to the fore try-sail:

The facts appearing on the record are:

a. The bark saw the steamer's masthead light a mile or more distant.

b. The steamer's lookout was on the starboard end of the bridge.

c. The officer of the watch was on the steamer's bridge.

d. The steamer's green light was on the starboard end of the bridge, and, therefore, close to the lookout.

e. Until the instant of collision no side lights on the steamer were seen from the bark.

f. Then the green light was seen.

g. Neither the officers nor lookout of the steamer saw the bark until the instant of collision, and neither of them saw her lights at all.

h. A steerage passenger in the steamer did see the bark's red light from his room just under the bridge, some time before the collision.

i. There was no fog.

j. Objects could be seen from 500 yards to a mile.

k. The bridge was aft the fore-mast and 150 to 180 feet, or more than a third of the steamer's length, from the bow.

l. The steamer's fore try-sail, fore stay-sail and jib were set and were all forward of the bridge.

The necessary conclusions, so indisputable as to amount to presumptions of law, from these facts are:

1. That the *state of the weather* did *not* prevent the bark's light from being seen by those in charge of the steamer, since her red light *was* seen by one of the steamer's passengers.

2. That the *state of the weather* did not prevent the steamer's side light from being seen on the bark.

3. Some other obstacle must have intervened. (The *Annie Lindsley*, 104 U S., 185.)

4. This obstacle was not on the bark, for her light *was* seen from the steamer.

5. It must, therefore, have been on the steamer.

6. This obstacle did not screen the barque's

light from the passenger who looked from his cabin port under the bridge.

7. It did screen the bark from the steamer's lookout and did also screen the steamer's light from the bark.

8. Nothing but the fore try-sail could have done this.

9. Therefore, the fore try-sail did it.

10. This was negligence in the steamer.

As to presumption and burden of proof:

The rule laid down by both Courts below must be considered in the ligh of the facts to which it was applied. It was this:

> The facts being, as found, that objects could be seen from five hundred yards to a mile, that the bark's lights were set and burning, and that the bark had fulfilled her legal duty by holding her course, it followed that it was the duty of the steamer to have kept out of the bark's way.
>
> A collision ensued—therefore there was a presumption of fault on her part.

It is respectfully submitted that the rule is sound and that the burden lay on the steamer to exonerate herself.

The cases cited by the appellant do not touch the point. The words quoted in the brief from "The *Florence P. Hall*" were used by the Court solely of the question of fog or no fog.

The *L. P. Dayton* was a case where no proof whatever was offered by either party, and the answers controverted material allegations of the libel.

This Court has emphasized the law of this case in The *Scotia* (14 Wall., 170–181), where it says, "Meeting a sailing vessel proceeding in such a direction as to involve risk, it was her (the steamer's) duty to keep out

of the way, and nothing but *inevitable accident* or the conduct and movements of the ship can *repel the presumption that she was negligent*—arising from the fact of the collision."

As to appellant's point II:

a. Lookout. "The substance of the facts found" is not as stated. There is no finding "*that the night was such* that although there was no fog around either vessel, *the side lights of both vessels were shut out from each other.*"

The facts as found are precisely the reverse.

"Objects could be seen at a distance of from five hundred yards to a mile" * * * "the port light of the bark was seen by a steerage passenger on the steamer." (Finding 7.)

The ingenious argument under this head falls with the false premise.

b. Speed of the steamer. This is found to have been eleven knots.

There is no finding, and was no proof, that "In the absence of fog around a vessel a partial mist, elsewhere on the surface of the ocean, will render side lights invisible at night to another vessel." Unless this is a fact so notorious that any Court will take judicial cognizance of it, no argument can be based on such an hypothesis here. If it is such a notorious fact, those in charge of the steamer must be deemed to have had knowledge of it, and, as according to the answer (Record, p. 6), they knew that there was "a misty state of the atmosphere which caused increased vigilance" on their part, they were negligent in not reducing the speed of the steamer sufficiently to enable them to avoid an approaching vessel when she could be seen.

As to appellants' point III.:

Fault of the bark—flare up—torch.

(*a*) The lights required by the law of her nationality were displayed by the bark.

(*b*) One of these lights was seen from the steamer.

(*c*) There was no fog.

(*d*) Irrespective of lights, the bark should have been seen more than a quarter of a mile.

The presumption is therefore irresistible that the absence of a flare up or torch did not contribute to the disaster.

(*e*) *Non constat* that the testimony below does not show that a torch was exhibited by the bark.

(*f*) The answer does not suggest, it nowhere appears from the record to have been, and as a matter of fact, was not suggested in either Court below, that the absence of a torch in anywise contributed to the collision.

(*g*) The steamer's defense, as appears by the record, was rested upon this averment.

"Respondent avers that the bark must have changed her course previously to the collision; that the deplorable result was attributed to such a change of course on the part of the bark; and that if the bark had held her course she would have passed the steamship on her starboard side; and that with side lights of the magnitude and character of those carried by the *Belgenland*, the green light of the steamship on such a night as that on which the collision occurred should have been observed in time to show that the course of the steamship was taking her on the starboard side of the bark."

This Court cannot, under the Act of 1875, assume a fact not found for the purpose of reversing a judgment. If it could it would not listen to an affirmative defence

based on such assumed fact here interposed or suggested for the first time; it is needless, therefore, to consider what law this Court will enforce in a controversy between foreigners. That question, however, is not lacking in the authority of adjudicated cases. The municipal regulation of the United States is not applicable to controversies between foreign vessels, the laws of whose nationalties do not contain the same provisions.

The *State of Alabama*, 17 Fed. Rep., 847.

The appellees desire to add to the citation under the point VIII. of their original brief:

The *Falcon*, 19 Wall., 75.

To point V. of their original brief they wish to cite:

The *Louisiana*, 23 How., 290.

J. Langdon Ward,
Henry Flanders,
Of Counsel.